

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1917.

No. 3089.

436

LOUIS CONRADIS, WALTER G. EISINGER, SURVIVING
PARTNER OF FRANK J. EISINGER, AND WALTER G.
EISINGER, TRADING AS EISINGER BROS.; W. STOKES
SAMMONS, TRADING AS "THE SHADE SHOP," A COR-
PORATION, AND THE W. E. THOMPSON COMPANY, A
CORPORATION, APPELLANTS,

vs.

RICHMOND PARK IMPROVEMENT COMPANY, INCOR-
PORATED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 30, 1917.

PRINTED JUNE 9, 1917.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1917.

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PARTNER OF FRANK J. EISINGER, AND WALTER G.
EISINGER, TRADING AS EISINGER BROS.; W. STOKES
SAMMONS, TRADING AS "THE SHADE SHOP," A COR-
PORATION, AND THE W. E. THOMPSON COMPANY, A
CORPORATION, INTERVENERS, APPELLANTS,

vs.

THE RICHMOND PARK IMPROVEMENT CO., INCOR-
PORATED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3089.

LOUIS CONRADIS et al., Appellants,

vs.

RICHMOND PARK IMPROVEMENT COMPANY, INCORPORATED.

a

Supreme Court of the District of Columbia.

In Equity. No. 34297.

RICHMOND PARK IMPROVEMENT COMPANY, INCORPORATED,
Plaintiff,

vs.

C. B. HIGHT, CHARLES A. VALENTINE, G. PITTS RALEIGH, and Charles H. Buck, Trustees; Harry E. Karr, Maryland Title Company, a Corporation; The New Amsterdam Casualty Company, a Corporation; James E. Edmunds and S. V. Kemp, Trustees; Louis Conradis, Walter G. Eisinger, Surviving Partner of Frank J. Eisinger and Walter G. Eisinger, Trading as Eisinger Bros.; W. Stokes Sammons, Trading as "The Shade Shop"; Artistic Lighting Shop, a Corporation; The W. E. Thompson Company, a Corporation, and Indiana Flooring Company, a Corporation, Interveners, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceed- had, in the above-entitled cause, to wit:

Bill of Complaint.

Filed April 28, 1916.

In the Supreme Court of the District of Columbia.

Equity. No. 34297.

RICHMOND PARK IMPROVEMENT COMPANY, INCORPORATED,
Plaintiff,

vs.

C. B. HIGHT, CHARLES A. VALENTINE, G. PITTS RALEIGH, and
Charles H. Buck, Trustees; Harry E. Karr, Maryland Title Com-
pany, a Corporation; The New Amsterdam Casualty Company, a
Corporation; James E. Edmunds, and S. V. Kemp, Trustees, De-
fendants.

To the Supreme Court of the District of Columbia:

Plaintiff, Richmond Park Improvement Company, Incorporated,
states as follows:

1. That the plaintiff is a corporation duly incorporated under and
existing by virtue of the laws of the State of Virginia, and brings this
suit in its own right.

2. That the defendants, C. B. Hight and Charles A. Valentine are
citizens of the United States and residents of the District of Columbia
and are sued in their own right; that the defendants G. Pitts Raleigh
and Charles Buck, trustees, are citizens of the United States and resi-
dents of the State of Maryland, and are sued in their capacity
2 as trustees under a certain deed of trust as hereinafter set
forth; that the defendant Harry W. Karr is a citizen of the
United States and a resident of the State of Maryland, and is sued in
his own right; that the defendant, Maryland Title Company is a cor-
poration, and plaintiff avers upon information and belief that it is in-
corporated under the laws of the State of Maryland, and is sued in its
own right, as hereinafter set forth; that the defendant, The New
Amsterdam Casualty Company is a corporation, doing business in,
and having an agent and place of business in the District of Colum-
bia, and plaintiff avers upon information and belief that it is incor-
porated under the laws of the State of Maryland, and is sued in its
own right, as hereinafter set forth; that the defendants, James E. Ed-
munds and S. V. Kemp, trustees, are citizens of the United States and
residents of the State of Virginia, and are used in their capacity as
trustees under a certain deed of trust as hereinafter set forth.

3. That heretofore, to wit, during the month of November, 1915,
and for a long time, that is twelve months, prior thereto, plaintiff
owned, in fee simple, amongst other real estate within the District of
Columbia, twelve lots, being lots numbered 69 to 80, inclusive, in
square 2063, of Richmond Park, in the subdivision by the Richmond

Park Improvement Company, Inc., of lots numbered 45 to 62, inclusive, in said square, as per plat recorded in the Office of the Surveyor for the District of Columbia, in liber 53 at folio 169. The aforesaid real estate was and is adjacent and near to other real estate

owned and still owned by plaintiff in the District of Columbia,
3 all of which, or practically all of which was and is well located

for residential purposes near the City of Washington, District of Columbia, adjoining Cleveland Park, and about two miles nearer the centre of the said City than Chevy Chase, a high-class suburban residential section of the District of Columbia, in the same general direction from said City and is part of the sub-division known as Richmond Park; that the said real estate so owned by plaintiff had at said time been subdivided into blocks and lots with streets laid off and constructed through the same for the purpose of selling said lots—many hundred in number—for high-class residential purposes, pursuant to a general scheme for the upbuilding of the subdivision of none but high-class residences, and by reason of the location of these lots and their being in a section near or contiguous to other high-class residential properties, it was and now is of first importance that any and all residences that might then, or may now be constructed, on plaintiff's said properties, should be of a value and type that would appeal to well-to-do and prosperous people, and that such dwellings should cost at least \$5,000 each; and be of a class which including the lot sell for about \$9,000 each; that the effect of placing cheaper buildings on said lots, and especially on the lots hereinafter mentioned as conveyed to the defendant, Charles A. Valentine, of a less cost than \$5,000 each, would result in a lowering of the marketability and value of said lots and the other lots owned by the plaintiff in said section and subdivision, and the consequent cheapening of all plaintiff's

said properties, and would destroy the general scheme for the
4 upbuilding of the entire subdivision. Of all these things the said defendants, C. B. Hight and Charles A. Valentine had knowledge throughout October, 1915, and all times since hitherto.

4. That, in order to secure the construction of twelve desirable detached residences costing not less than \$5,000 each on twelve of the lots owned by plaintiff, being part of said subdivision, that is to say, one dwelling on each of lots numbered 69 to 80, both inclusive, in square 2063 aforesaid, plaintiff entered into a certain option contract bearing date, to wit, October 13, 1915, with the said defendant, C. B. Hight, a copy of which marked "Plaintiff's Exhibit A", is herewith filed and prayed to be read and treated as a part hereof. The said contract covers what were formerly lots 45 to 62 (both inclusive) in said square. In and by said contract these lots were to be re-subdivided into twelve lots and that was subsequently done. By such re-subdivision the lots are designated and known as lots 69 to 80, both inclusive. By said contract it was, amongst other things, provided that said lots should be delivered by plaintiff to the said defendant Hight, or his assigns, free of incumbrances, and that he should have the right to place on each lot a building loan to be secured by a first deed of trust on said lot in an amount not to exceed four-fifths of the cost of the contemplated improvement thereon; that said lots should be

paid for by said Hight at thirty-five cents per square foot, in promissory notes of a so-called "straw man", and said notes to be secured by second deeds of trust on said lots subsequent only to said proposed building loans.

5 It was further contemplated and agreed between your plaintiff and the said Hight that after the dwellings should be erected on said lots, said lots and houses should be sold, and that said Hight should receive from the cash payment on each house and lot the sum of \$1,000, which amount he would have theretofore put in each of said properties over and above the \$4,000 building loan to make up the \$5,000 minimum cost of each house, and also certain notes of the purchaser as more fully and at large appears in said contract, to which reference is again hereby made.

5. Plaintiff further shows to the Court that the said defendant C. B. Hight exercised the option given under said contract and formally accepted the same, and announced his intention of constructing upon said lots houses which were to cost, when completed \$5,000 or more; that he subsequently furnished plaintiff with blue prints and specifications of proposed detached dwellings to be constructed on said lots and stated and represented to plaintiff its representatives and officers that the cost of each dwelling described by said blue prints and specifications would be over \$5,000 and that the building loan which he promised to place as a first trust upon each lot, or cause to be placed thereupon, would be \$4,000 so as not to exceed four-fifths of the cost of the proposed improvements, in accordance with his contract with plaintiff. On November 8, 1915, said defendant C. B. Hight wrote plaintiff a letter, copy of which is hereto annexed, marked "Plaintiff-Exhibit B" which is prayed to be taken and read as a part hereof, in which he specifically states:

6 "The cost of improvements as contemplated and covered by blue print and specifications will be over Five thousand (\$5,000) Dollars per house."

6. Plaintiff further shows to the Court that it had no knowledge as to what the dwellings described in the said blue prints and specifications so furnished by said defendant C. B. Hight would cost, but relied upon said defendant Hight's continued statements and representations, and his contract and letters, that each dwelling would cost not less than \$5,000 in order that plaintiff would be protected in its second trust for said purchase price of said lots, and has security therefor.

7. Plaintiff further shows to the Court that said defendant C. B. Hight designated the defendant Charles A. Valentine as the "straw man" to whom plaintiff should convey the said twelve lots, and advised plaintiff that this said "straw man" should execute his notes payable to the order of the plaintiff for the purchase price of the said lots at the rate of thirty-five cents per square foot, which said notes were to be secured by the said second deed of trust to be a lien upon the said property, second only to the proposed building loans of \$4,000 so as not to exceed four-fifths of the cost of proposed improvements. The said defendant C. B. Hight exhibited to plaintiff the proposed deed of trust to be executed by said defendant Valentine for the amount of the proposed building loan prior to the time plaintiff

conveyed said twelve lots to said Valentine. In order that plaintiff might be assured that the proposed dwelling on each of said lots would cost not less than \$5,000 so that plaintiff would have security for the said purchase price, plaintiff, before the delivery of its deed
 7 conveying said twelve lots to said defendant Valentine as designated by said defendant Hight, did, on or about November 15, 1915, demand that said defendant Hight should, as a part of his contract with plaintiff, expressly and specifically state and agree in writing that each dwelling to be erected on each of said lots would cost not less than \$5,000 and that said defendant C. B. Hight on said last mentioned date wrote plaintiff as follows:

"At the suggestion of your attorney, Mr. Kemp, I beg herewith to advise you that as a part of my contract with you, I will build or have built on the twelve lots numbered 69 to 80 in square 2063 twelve detached dwellings after plans and specifications already submitted and approved by you namely, for each of the three types A, B and C, and to cost not less than \$5,000 each."

A copy of said letter marked "Plaintiff's Exhibit C" together with a copy of plaintiff's reply thereto, by S. G. Hamner, its President, under date of November 19, 1915, marked "Plaintiff's Exhibit D" are herewith filed and prayed to be read and treated as parts hereof.

8. That, relying and depending upon said defendant C. B. Hight's continued representations, assurances, letters, and contract in the premises, plaintiff thereupon delivered to said defendant Hight its deed to the said twelve lots, conveying the same, free of incumbrance, to the said "straw man", Charles A. Valentine, the said deed being dated November 10, 1915, and recorded November 18, 1915, at liber 3849, folio 48 et seq. of the Land Records of the District of Columbia. And plaintiff prays that the same may be taken and read as a part of this bill.

8 9. That, at or about the same time, and as a part of the transaction between Hight and his "straw man" Valentine, said defendant Charles A. Valentine and his wife, Carrie E. Valentine, executed a deed of trust on the said lots, conveying the same to the defendants G. Pitts Raleigh and Charles H. Buck, trustees, the said deed of trust reciting that the conveyance was to secure the defendant Harry E. Karr for an indebtedness of \$48,000 owing him by the defendant Charles A. Valentine, represented by said Valentine's certain twelve notes each in the sum of \$4,000, as more fully described in the said deed of trust, one of each of said notes being secured on each of said lots. The said deed of trust was dated November 16, 1915, and was recorded November 18, 1915, at liber 3849, folio 50, et seq. of the Land Records of the District of Columbia, and is prayed to be taken and read as a part of this bill. And plaintiff avers that the said indebtedness of \$48,000 described in the said deed of trust was the said proposed building loans of \$4,000 each, which the defendant Hight had secured for the erection of the said houses upon the said lots, as herein set out.

10. Plaintiff further shows to the Court that at the same time, and as a part of the same transaction, the said defendant, Charles A. Valentine, and his wife, Carrie E. Valentine executed a second deed

of trust upon said lots, conveying the same to the defendants J. E. Edmunds and S. D. Kemp, Trustees, to secure the plaintiff for an indebtedness due and owing from the defendant Charles A. Valentine to plaintiff, in the sum of \$20,842.00, represented by twelve notes of the said defendant, Charles A. Valentine, payable to the order of the plaintiff and more fully described in the said deed of trust, these notes being for the purchase price of the said property, which the defendant, C. B. Hight, had agreed to pay the plaintiff, the said deed of trust being dated November 16, 1915, and recorded November 18, 1915, at liber 3849, folio 54 et seq. of the Land Records of the District of Columbia. And plaintiff prays that the same may be taken and read as a part of this bill.

11. Thereupon, at the said time, and as a part of the same transaction between said Hight and said "straw man" Valentine, by deed dated November 16, 1915, and recorded November 18, 1915, at liber 3849, folio 59, et seq. of the Land Records of the District of Columbia, the defendant Charles A. Valentine, and Carrie E. Valentine, his wife, conveyed the said lots to the defendant, C. B. Hight.

12. Plaintiff further shows to the Court that subsequent to the recording of the said several conveyances mentioned in paragraphs 8-11 of this bill, the defendant Hight commenced the construction and erection of dwelling- on said twelve lots, some of which are nearing completion. Plaintiff about March 1916, learned for the first time that the said dwellings which were being erected were of such construction that when completed they would cost far less than five thousand dollars each, and that it would have practically no security for the purchase price of the said lots, represented by the said notes described in said deed of trust to defendants James E. Edmunds and S. V. Kemp, by reason of the inferiority of the houses being placed upon the said lots, the cost of said houses being much less than the first trust building loan of \$4,000 each thereon.

10 As soon as information of this character was received by plaintiff it caused an examination and investigation to be made as to the cost of the said houses by competent persons, and plaintiff has been advised and informed by such persons that each of said houses when completed will cost far less than \$5,000, that no one of said houses when complete will cost as much as \$4,000, but that they will each cost about \$3,550, and that it will have practically no security, if any at all, for the purchase price of the land upon which the said houses are being erected, this being the indebtedness represented by the said notes secured by the said second deed of trust. Plaintiff avers that such information is true, and that said houses completed will have cost only, to wit, \$3,550.

13. Plaintiff further avers that said defendant, C. B. Hight, at the time he entered into said contract marked "Plaintiff's Exhibit A" and at the time he wrote the said letters marked "Plaintiff's Exhibits B and C", and at all times since, had no intention whatever to build on the said premises houses of the value of \$5,000, but that while he was making such promises and assurances to plaintiff without incurring any personal liability himself on the notes, and acting through his "straw man" the defendant Charles A. Valentine, the said

defendant Hight at all times intended only to build cheap houses upon said lots, at a cost of less than \$4,000, which he arranged to borrow as a building loan secured by the first deed of trust, and that it was the intention of the said defendant Hight at all said times, after erecting such cheap houses, at a cost of less than \$4,000 each, 11 to appropriate to himself and his own use the difference between the actual cost of the said cheap dwellings and the \$4,000 building loan on each of said houses. To that end, the said defendant Hight, acting through the said defendant Charles A. Valentine, secured the said loan of \$4,000 on each of said lots for a period of only one year, the said defendant C. B. Hight being an experienced builder of houses and well knowing that said houses would cost less than \$4,000 each, and that it would take at least six months to complete the said houses. And plaintiff avers upon information and belief that it was the intention of the said defendant C. B. Hight and the said Charles A. Valentine to permit the said houses to be foreclosed under the said deed of trust at the expiration of the said one year thereby leaving the plaintiff without any security for the purchase price of the said property.

14. Petitioner further shows to the Court that the said defendant Hight by his aforesaid actions in erecting and constructing on said lots dwellings at a cost of \$3,550, is knowingly committing, and has committed a fraud, upon plaintiff; that the said defendant Hight has for years prior to the time of the occurrence of these grievances been engaged in and doing the business of erecting and constructing dwelling houses within the District of Columbia; that he knew at the time of submitting the aforesaid blue prints and specifications of the aforesaid proposed dwellings and especially at the time of his making the representations, promises, and agreements as above stated, that the houses he proposed to build, or then had under construction according to said blue prints and specifications, would cost considerably "less than \$5,000 each", and would not cost "over \$5,000 12 per house" to build, and that his said promises and statements had induced, and did induce, plaintiff to enter into said contract and to take a second trust on said property for the purchase price thereof, and that said defendant Hight well knew that the said statements were false; that he knew that when the said houses were completed they would cost only about \$3,550 per house; that he had knowledge of all these facts at the time of fraudulently procuring the delivery of said deed from plaintiff for the said lots, as stated in paragraph 8 of this bill, under the circumstances aforesaid, and has had such knowledge at all times since hitherto; that his aforesaid act and doings were for the deliberate purpose of and have resulted in the commission of a fraud on plaintiff; that he has already received part of the benefits of, and profited by, his aforesaid fraud; that he has received, on account of the said building loans represented by said trust made in the name of the said defendant Valentine, in some instances more than the actual cost of the said houses, and if he be permitted to continue in the perpetration of his aforesaid fraud, he would continue to collect and receive and hold for himself approximately \$450 of said \$4,000 building loan upon each of the said dwellings;

that, in consequence thereof, plaintiff's said lots conveyed as aforesaid to said defendant Valentine, will have improvements thereon of the value of not more than \$3,550, and will be subject to the first trust described in paragraph 9 of this bill of \$4,000 on each of said lots, and plaintiff would have no security whatever for the purchase

price of the said lots, but will have only the notes of the said
13 "straw man", the defendant Charles A. Valentine representing the said purchase price due plaintiff for said lots, and the said second trust will be no or practically no security whatever. Plaintiff further says that the lots themselves which were conveyed by plaintiff to the said defendant Valentine and plaintiff's adjacent and nearby lots will be, and have been, by reason of the construction of ten of the said inferior and cheap dwellings, lessened and diminished in marketability and value; that, instead of plaintiff having a second lien for its purchase money notes for said lots on said lots with buildings thereon costing \$5,000 each, and with \$1,000 invested in each of said houses by the defendant Hight as contracted by said defendant Hight as aforesaid, subject to a lien of but \$4,000, plaintiff will have a second lien on each of said lots to secure said purchase money notes with a house thereon costing but \$3,550, and subject to the prior \$4,000 building loan, and defendant Hight will have secured and appropriated to his own use the difference between the actual cost of each of said houses, and the said building loan of \$4,000 thereon, or approximately \$450 on each of said lots.

15. Plaintiff further shows to the Court that it first learned of the fraud committed and being committed by said Hight, upon it, in, to wit, March, 1916, and thereupon at once and has repeatedly since, requested of said defendant Hight that he give plaintiff information as to the actual cost of each of said dwellings then constructed or being constructed by him upon the lots conveyed by plaintiff to said

defendant Valentine, as aforesaid, showing the contract price
14 of each house, and the amounts of money collected or received, or paid over from said building loan upon and in the construction of said houses but the said defendant refused and declined to give to plaintiff or its representatives any information touching the same, or to even furnish the means of obtaining such information; that subsequently plaintiff made formal written request of said defendant Hight for such information and mailed the same by registered mail to said Hight, who thereafter admitted having received such request that said defendant Hight has not furnished the requested information, although he has since had ample time in which to do so.

16. Plaintiff further shows to the Court that the dwellings being erected by the said defendant Hight on ten of the said lots, being lots numbered 69 to 78, inclusive, in said square, are almost completed in their construction. Plaintiff avers on information and belief that the advances already made on account of the building loans on each of the said ten lots had been more than sufficient to erect and construct said dwellings complete, but nevertheless the defendant Hight expects to receive the remainder of the said building loan from the defendant Maryland Trust Company, through the defendant New

Amsterdam Casualty Company, on April 29, 1916, unless restrained by an order of this Honorable Court and if the said defendant Hight is permitted to receive the balance of the said building loan, the exact amount of which balance is unknown to plaintiff, plaintiff avers that the said defendant Hight will not use the said balance of the said building loan for the improvement of the said premises, as he has received more than enough with which to complete the said dwellings, but will divert and appropriate the same to his own use.

15 17. Plaintiff further shows to the Court that the defendant Hight has just started the construction of two similar dwellings on said lots numbers 79 and 80, in said Square, and that these said dwellings, when completed, according to the aforesaid blue prints and specifications, will cost not more than \$3,550 each, and if said defendant Hight is permitted to construct such dwellings on said two lots as he has informed plaintiff it is his purpose to do, he will thereby commit further fraud on plaintiff, and will corruptly reap further profit and benefit to himself and further cheapen and diminish in value the said two lots and plaintiff's other nearby and adjacent properties in their marketability, and value.

18. Plaintiff further shows to the Court that a contract exists between defendant Maryland Title Company and defendant Harry E. Karr by which the said building loan is actually being paid and advanced to the said defendant Hight by the defendant Maryland Title Company, through the defendant New Amsterdam Casualty Company, and the representative of said last mentioned company in the District of Columbia; that in order to secure the said building loan with which to construct said twelve houses the said defendant Hight entered into an agreement with the said defendant Harry E. Karr, whereby the said defendant Karr was to and did apply to the Maryland Title Company of Baltimore, Maryland, for a building loan to be advanced on said property as the work on the said buildings progressed, which said building loan was to be secured by the first deed of trust on said property described in paragraph 9 of this bill; that it was agreed between the said defendants C. B. Hight, Harry E.

16 Karr, and Charles A. Valentine, that the said defendant Valentine, "straw man" should execute his twelve one year promissory notes aggregating the sum of \$48,000 payable to the order of the said Karr, which the said defendant Karr was in turn to endorse over to said Maryland Title Company, which would discount the same and advance the cash therefor. Plaintiff further avers that the said defendant C. B. Hight could not have obtained a building loan of as much as \$4,000 on the improvements to be erected according to the plans and specifications on each of said lots, without pledging the credit of the said defendant Harry E. Karr, who is financially responsible. Plaintiff further avers upon information and belief that the said Maryland Title Company in advancing said building loan did not consider the value of the proposed houses to be erected upon the said lots but advanced the said money on the personal credit of the said defendant Harry E. Karr, and the value of the houses to be erected upon the said lots was not considered to any material extent by the said Title Company. The said Maryland Title Company, however, re-

quired of the said defendants Hight and Karr before it would discount said notes and advance said \$48,000 building loan, that the said dwellings when completed should be free of all mechanics' liens thereon, and demanded of the said two defendants that they be protected by the bond of a surety company conditioned upon the completion of the said dwellings free of all such liens. The said defendant, New Amsterdam Casualty Company, agreed to write such a bond conditioned upon the completion of the said houses free of all such liens, provided the said \$48,000 to be paid by the defendant Maryland Title Company when discounting said notes of the defendant Valentine payable to the order of said defendant Karr, should

17 be disbursed by it, and the whole amount of the said \$48,000 paid to it. The said defendant, The New Amsterdam Casualty Company, in order that it might be assured that the whole of said building loan might be available for the bills of labor and material men in constructing said dwellings. And plaintiff shows to the Court that the said New Amsterdam Casualty Company is the party which has in hand the remainder of the said building loan which has not been heretofore advanced to or received by said Hight, and that it now has in its hands and possession a sum of money, the exact amount of which is unknown to plaintiff, being part of the said building loan of \$48,000 all of which should have gone into the erection of the said houses, which plaintiff avers, is considerably in excess of the amount actually required to complete said houses.

19. That the said defendant Charles A. Valentine the "straw man" to whom plaintiff deeded its said lots under its agreement which said defendant Hight is insolvent, or possesses no means or financial ability to pay the purchase money notes secured by second deed of trust lien as aforesaid, to plaintiff; that plaintiff is the owner and holder of said notes aggregating \$20,842.50; that their value and collectibility is wholly dependent upon the security afforded by the second deed of trust liens aforesaid; that the said Valentine is but the agent, medium, or "straw man" of the said Hight for the purpose of executing building loan first lien deed of trust and obligations therefor and the purchase money promissory notes and the second deed of trust lien securing the same and has no equity in or right to said lots; that indeed, and as part of the understanding between said defendant

18 Valentine and said defendant Hight, the said defendant Hight caused the said defendant Valentine and his wife Carrie E. Valentine at the same time as the execution of the aforesaid deed of trust on said lots to convey all their right, title and interest in said lots unto him said defendant Hight and this is the conveyance described in paragraph 11 of this bill.

20. Plaintiff further states that the ten houses built on said lots by defendant Hight and the two houses being built thereon by him will be offered for sale by him at the price of \$7,000 or less each including the lot, but that he will be unable to sell them at a greater price than \$5,000 each. The said houses should be of a kind which, if the said defendant Hight had carried out his contract with plaintiff, would sell, including the lot, at the price of \$9,000 each.

21. Plaintiff further shows to the Court that the defendant Hight has announced his purpose of renting the said twelve houses as soon as they are completed, and has already placed them in the hands of a firm of real estate agents for that purpose.

22. Plaintiff further states that if the defendant Hight is permitted to carry out his scheme hereinbefore set forth, the same will result in a loss to it of the entire purchase price of said lots, that is to say, about \$18,000, and that it would be unable to collect or realize on any judgment that it might obtain against said defendant Hight in an action at law for breach of his contract to erect houses costing not less than \$5,000 each on said lots, and that from the best information it can obtain, it believe- and charges, that the said defendant Hight is insolvent and unable to pay plaintiff's claim against him, or
19 any part thereof.

23. Plaintiff is advised that a court of Equity, regarding as done that which is contracted to be done, will treat the balance of said loan of \$48,000 not yet paid over to said defendant Hight, as money of the said defendant Hight in the hands of the defendant Maryland Title Company or in the hands of the defendant New Amsterdam Casualty Company, and will, for the purpose of preventing consummation of a fraud upon plaintiff, impress a trust upon said balance, in favor of plaintiff, and direct the application of the same in such manner as to protect plaintiff against any loss by reason of the fraudulent acts of the said defendant Hight, as hereinbefore set forth.

24. That plaintiff is ready and willing and hereby offers upon the payment of the aggregate sums thereof as hereinafter prayed for, to transfer and assign (but without recourse on plaintiff) to the said Hight or his order, the aforesaid Valentine purchase money second lien and a deed of trust securing the same.

Wherefore, the premises considered, plaintiff prays as follows:

1. That the writ of subpœna may be issued to the defendant named in the caption hereof, and that the defendants, C. B. Hight, Charles A. Valentine, Harry E. Karr, Maryland Title Company, and the New Amsterdam Casualty Company and each of them be required to appear herein and answer the exigencies of this bill, but answer under oath is hereby expressly waived as to each of them.

2. That the defendant, C. B. Hight, be enjoined and restrained
pendente lite and permanently from receiving from the de-
20 fendants Harry E. Karr, Maryland Title Company, and New
Amsterdam Casualty Company, their agents, servants, and
representatives, and the said defendants Harry E. Karr Maryland
Title Company, and New Amsterdam Casualty Company, their agent,
servants and representatives, be likewise enjoined and restrained
pendente lite and permanently from paying to the said defendant
C. B. Hight the balance of the said loan of \$48,000 remaining in their
hands; and that the balance of said loan be paid into the hands of a
receiver to be appointed herein, and be applied under the direction of
this Court in such manner as to protect the plaintiff, as far as possible,
against loss from the fraudulent notes of the defendant Hight in the
premises.

3. That the said defendant C. B. Hight be enjoined pendente lite

and permanently from prosecuting the construction of the said two houses on lots 79 and 80 in square 2063.

4. That the said defendant C. B. Hight be required in this proceeding to give and discover full and complete information as to the cost of the said several dwellings.

5. That all necessary and proper accounts be ordered and taken under the direction of this Honorable Court.

6. That defendant Hight be restrained and enjoined from renting out the twelve houses hereinbefore mentioned.

7. That a personal decree be entered herein against the defendant C. B. Hight in favor of the plaintiff for such damages as the plaintiff has or may sustain by reason of the premises.

21 8. And that plaintiff may have such other and further relief as to the Court may seem meet and proper.

RICHMOND PARK IMPROVEMENT COMPANY, INC.,

[SEAL.] By S. G. HAMNER, *President*.

DISTRICT OF COLUMBIA, ss:

S. G. Hamner being first duly sworn deposes and says that he has read the foregoing bill of complaint by him subscribed as President of the plaintiff corporation and that he is duly authorized to execute the same; that he knows the contents thereof and that the matters and things therein stated as of personal knowledge are true, and those stated upon information and belief he believes to be true.

S. G. HAMNER.

Subscribed and sworn to before me this 27th day of April, A. D. 1916.

[SEAL.]

RALPH S. SHERLINE,
Notary Public, D. C.

My commission expires January 4th 1920.

FRED B. RHODES,
PAUL B. CROMELIN,
Attorneys for Plaintiff.

For and in consideration of \$10.00 to it in hand paid by C. B. Hight, receipt of which is hereby acknowledged, the Richmond Park Improvement Co. Inc. has sold, given and granted, and does by these presents sell, give and grant to said C. B. Hight or his assigns the right at any time within thirty (30) days from the date hereof to purchase the following lots in the subdivision known as Richmond Park, viz: Lots numbered forty-five (45) to sixty-two (62) both inclusive in Square numbered Two Thousand sixty-three (2063). The said

lots numbered forty-five to fifty inclusive to be resubdivided by said Richmond Park Improvement Co. Inc. into four lots of equal frontage of forty-six feet three inches, and said lots 51 to 62 inclusive to be resubdivided by the said Richmond Park Improvement Co. Inc. into eight lots, the two end lots each abutting on a 10 foot alley to have an equal width of thirty-five feet, and the remaining six inside lots to have an equal width each of forty feet. This resubdivision to be made and spread on the records of the Surveyor for the District of Columbia at once.

Said lots to be delivered to the said C. B. Hight or his assigns free of encumbrance. Taxes adjusted to date of delivery. Gutters, sidewalk, macadam roadway from Porter Street north on 35th Street to Rodman Street to be furnished as soon as practicable by the said Richmond Park Improvement Co. Inc., also gutters on Rodman Street on the side next to the lots above mentioned, and macadam 12 to 15 feet in width in Rodman Street from 35th Street to the easternmost 10' alley above referred to. The rough stone for the
 23 macadam both on 35th street and on Rodman Street to be put on as soon as practicable, and the finishing stone when the houses are completed. Water and sewer for the above referred to lots to be immediately applied for to serve lots 45 to 50 inclusive at the expense of the said C. B. Hight and to serve lots 51 to 62 both inclusive at the expense of the said Richmond Park Improvement Co. Inc.

The said C. B. Hight is to have the right to place on each lot or lots a building loan to be secured by a first deed of trust on said property in amount not to exceed four-fifths of the cost of the contemplated improvements. The plans and specifications of said improvements to be satisfactory to the said Richmond Park Improvement Co., Inc. or its duly authorized representative.

Said lots to be paid for by said C. B. Hight at the rate of thirty-five cents per square foot. Payment to be made in the promissory notes of a so called "straw man" to the order of said Richmond Park Improvement Co. Inc. at two years, six per cent interest from date; the said notes to be secured by second deeds of trust on said lots, subsequent only to said building loans. It is distinctly understood that there is no personal obligation on the part of the said C. B. Hight for the payment of said notes secured by second deeds of trust.

As the houses are completed and sold the above mentioned second trusts given for purchase money on the lots are to be exchanged with said C. B. Hight for whatever the cash payment amounts to over one thousand dollars (\$1,000.00) in cash, and the balance in the alternate first, third, fifth, seventh, etc. monthly notes of the purchaser likewise secured by second deed of trust on said lots,
 24 subsequently only to said building loan. Should the cash payment be \$1,000.00 or less, then no cash is to pass for the release of the first above mentioned second trusts, and same to be exchanged for equal amount of buyers alternate notes as described above.

In testimony whereof the said Richmond Park Improvement Co. Inc. has caused this option to be executed this 13th day of October,

1915, by the signature of its president and attested by its secretary and bearing the corporate seal of said company hereto attached.

RICHMOND PARK IMPROVEMENT CO.,
INC.,

By S. G. HAMNER, *Pres.*

[Corporate Seal.]

H. E. DE WITT, *Sec'y.*

Approved

C. B. HIGHT.

WASHINGTON, D. C., November 8, 1915.

Richmond Park Improvement Company, Incorporated, c/o S. G. Hamner, President, Peoples Bank Building, Lynchburg, Va.

GENTLEMEN: I am enclosing you herewith deed to the lots 45 to 69 Square 2063 now known as lots 69 to 80 from your Company to Charles A. Valentine as it seems that everything is ready for this deal to go through on Wednesday.

Kindly execute this deed and return it to the District Title Insurance Company, Washington, D. C., with instructions to them to record same when they have in hand two deeds of trust on the same property. The first deed of trust to cover building money in the amount of Four Thousand Dollars (\$4,000.00) each on twelve houses. The second deed of trust in your favor to cover purchase price of the lots at thirty-five cents per square foot. The cost of the improvements as contemplated and covered by blue prints and specifications will be over Five Thousand Dollars (\$5,000.00) per house.

I suppose the current taxes are paid on this property. If not, will you kindly see that payment is made at once.

What can you tell me in regard to the macadamizing of the streets.

26 In regard to the small part of these lots on which there seems to be a slight cloud in the title I have just been notified officially by the loan people, this is after having had a talk to-day with your Mr. Oehmann, that they will accept the deed of trust just the way the matter stands, but that they will not advance any money to me until the title is made perfect. Kindly advise me immediately just how long this will take and as to whether you would be willing to guarantee that the title will be made perfect in a certain time, as I could not afford to build the two houses affected by this cloud unless I was sure that same would be fixed at a certain time.

Very truly yours,
(Signed)

C. B. HIGHT.

27

PLAINTIFF'S EXHIBIT C.

WASHINGTON, D. C., November 15, 1915.

Richmond Park Improvement Company, Incorporated, c/o S. G. Hamner, President, Peoples Bank Bldg., Lynchburg, Va.

GENTLEMEN: At the suggestion of your attorney, Mr. Kemp, I beg to herewith advise you that as part of my contract with you I will build or have built on the twelve lots numbered 69 to 80 in Square 2063, twelve detached dwellings after plans and specifications already submitted and approved by you, namely, four each of the three types A-B & C, and to cost not less than \$5,000.00 each.

These twelve dwellings I guarantee will be completed on or before six months from this date. Of course, however, as to the two proposed dwellings on lots 79 and 80 they will be finished within six months from the date of your clearing the title.

The buildings when completed will be free and clear of all claims or demands under the law commonly called the Mechanics' Lien Law.

Very truly yours,
(Signed)

C. B. HIGHT.

28

PLAINTIFF'S EXHIBIT D.

November 19th, 1915.

Messrs. C. B. Hight & Company, Colorado Building, Washington, D. C.

GENTLEMEN: I have your favor of the 18th instant enclosing me a copy of the specifications for the new houses at 35th & Rodman Streets. We will leave the matter of the specifications to you as we are very much pleased with the houses you have already built and we have no doubt that we will be equally pleased with those you are now about to build. If the plans and specifications are satisfactory to you, and the houses will cost at least \$5,000.00 each they will be satisfactory to us.

In regard to the macadam, we will send a representative to Washington in the next day or two to make the contract for putting in the rough stone.

Yours very truly,

S. G. HAMNER.

S. G. H./M.

Copy.

29

Memoranda.

"Petition of Walter G. Eisinger, et als., praying to be allowed to intervene, filed June 26, 1916."

"June 26, 1916, Order of Court allowing Walter G. Eisinger et als., to intervene as parties defendant."

"Motion of plaintiff to dismiss intervening petition of Walter G. Eisinger, et als., filed June 26, 1916."

"Joint answer of Walter G. Eisinger, et als., intervening defendants, to the Bill, filed June 26, 1916."

"June 27, 1916, Order of Court overruling plaintiff's motion to dismiss intervening petition; and plaintiff's exception."

"Motion of plaintiff to strike out joint answer of Walter G. Eisinger, et als., intervening defendants, filed June 27, 1916."

"July 5, 1916, Decree of Court striking out joint answer of Walter G. Eisinger, et als., intervening defendants; with leave to file amended joint answer."

30

Amended Answer of Intervening Defendants.

Filed July 8, 1916.

* * * * *

These defendants, with leave of the Court first had and obtained, file this, their amended answer to the original bill of complaint exhibited in this cause, and in which cause they have, by order passed herein, been allowed to intervene, as parties defendant:

These defendants for answer to the bill of complaint say:

1. They are without knowledge concerning the incorporation of the plaintiff.

2. They admit the averments of paragraph two concerning the residence and citizenship of the defendants.

3. They admit the ownership by the plaintiff of the lots described in paragraph three, being lots 69 to 80, both inclusive, in square 2063, of Richmond Park, in the District of Columbia and believe said lots to be in a fair residential section of said District. Concerning the other averments of said paragraph they are without knowledge.

4. They admit the execution of the "option contract," referred to in paragraph four.

5. They admit the defendant Hight exercised the option given him by the above mentioned option contract and purchased the aforesaid lots from the plaintiff upon the terms therein mentioned. Concerning the other facts recited in this paragraph these defendants are without knowledge.

31 6. They are without knowledge as to the truth or falsity of the averments of paragraph six.

7. They are without knowledge as to the truth or falsity of the averments of paragraph seven.

8. They admit the delivery by the plaintiff to Charles A. Valentine of the deed to the aforesaid lots as set out in paragraph eight, but are without knowledge concerning the representation of the defendant Hight charged in this paragraph.

9. They admit the averments of paragraph nine.

10. They admit the averments of paragraph ten.

11. They admit the averments of paragraph eleven.

12. They admit that the defendant Hight subsequent to the recording of the conveyances mentioned in paragraphs 8-11, commenced the erection of said buildings and further say that said buildings are now completed. They are without knowledge as to the truth or falsity of the other averments of this paragraph.

13. They are without knowledge as to the truth or falsity of the averments of paragraph thirteen.

14. They are without knowledge as to the truth or falsity of the averments of paragraph fourteen.

15. They are without knowledge as to the truth or falsity of the averments of paragraph fifteen.

16. In answer to paragraph sixteen they say that the buildings on said ten lots being lots 69 to 78, both inclusive, are fully completed and that there remains now in the hands of the defendant, New Amsterdam Casualty Company, surety for the defendant Hight, unpaid on account of said loan, the sum of \$4,975.00. Concerning the remaining averments of said paragraph these defendants are

32 without knowledge.

17. They admit that the defendant Hight has started the remaining two houses on lots 79 to 80 in said square but are without knowledge concerning the remaining averments of said paragraph.

18. They admit the averments of paragraph eighteen.

19. They are without knowledge as to the truth or falsity of the averments of paragraph nineteen.

20. They are without knowledge as to the truth or falsity of the averments of paragraph twenty.

21. They are without knowledge as to the truth or falsity of the averments of paragraph twenty-one.

22. They are without knowledge as to the truth or falsity of the averments of paragraph twenty-two.

23. This paragraph advancing a proposition of law they are advised that they need make no answer thereto.

24. They are without knowledge as to the truth or falsity of the averments of paragraph twenty-four.

25. These defendants further, and in connection with the affirmative relief which they seek in this cause, say:

26. The defendant, Louis Conradis, under a contract with C. B. Hight Company, a corporation, organized and controlled by the defendant, C. B. Hight, supplied the material for and installed the plumbing work in the ten houses mentioned in said bill as having been erected on lots 69 to 78, both inclusive, in square 2063, in the Richmond Park Subdivision. That said work has been fully per-

33 formed by this defendant. That the price agreed to be paid by the said C. B. Hight Company for said work is \$2,920.00, and of this amount this defendant has received the sum of \$1,960 leaving a balance still due him from the said C. B. Hight Company, on account of said work, of \$960.

27. The defendant, Eisinger Bros., under a contract with the said C. B. Hight Company, furnished the lumber used in the construction of said ten houses for the agreed price of \$3,275.00 of which the sum

of \$1,500.00 only has been paid, leaving a balance of \$1,775 now due from the said C. B. Hight Company to this defendant on said account.

28. The defendant, W. Stokes Sammons, trading as "The Shade Shop," under a contract with the said C. B. Hight Company, supplied the material for and papered the aforesaid ten houses, said work being now fully completed. That the price agreed to be paid by the said C. B. Hight Company for said work is \$400, of which nothing has yet been paid, and the said sum of \$400 is now due this defendant from the said C. B. Hight Company on account of such work.

29. The defendant, Artistic Lighting Shop, under a contract with the said C. B. Hight Company, supplied and installed the lighting fixtures in the aforesaid ten houses, said work being now fully completed. That the price agreed to be paid by the said C. B. Hight Company for said work is \$350 of which nothing has yet been paid, and the sum of \$350 is now due this defendant from the said C. B. Hight Company, on account of said work.

30. The defendant, The W. E. Thompson Co., under a contract with the said C. B. Hight Company supplied the tile work in
34 the construction of the aforesaid ten houses for the agreed price of \$262, of which but the sum of \$152 has been paid, leaving a balance of \$110 now due this defendant from the said C. B. Hight Company on account of said work, which is now fully completed.

31. The defendant, the Indiana Flooring Company, under a contract with the said C. B. Hight Company, furnished the flooring in the aforesaid ten houses for the agreed price of \$1,280; of this amount but the sum of \$700 has been paid, leaving a balance of \$580 now due this defendant from the said C. B. Hight Company, on account of said work.

32. These defendants further say, that the building loan of \$4,000 per house, referred to in said bill was negotiated by the defendant, Hight for the specific and sole purpose of paying for the building of the houses to be erected by him on the lots purchased by him from the plaintiff, which is to say, that said money was borrowed by the said Hight to pay for the material and labor used in building said houses; that these defendants and each of them knew of the loan contract between the defendants, Harry E. Karr and Charles A. Valentine, before supplying their aforesaid material and labor, and were informed and promised by the defendant Hight on behalf of himself as well as on behalf of the Hight Company; that the said loan was to be used for the purpose aforesaid and they relied upon this representation and promise as the basis of the credit they extended the Hight Company, and not upon the individual responsibility of the Hight Company. Upon information and belief these defendants further

35 say, that the defendants, Harry E. Karr and the Maryland Title Company, at the time of making said building loan and the defendant, The New Amsterdam Casualty Company, in becoming surety on the bond of the defendant, Hight, knew that said loan was being negotiated for this purpose, and that the proceedings were to be applied to the payment for material and labor used in said buildings, and that the plaintiff also possessed the same knowledge. In this

connection these defendants call attention to the following averment in paragraph eighteen of the plaintiff's bill. "The said defendant, New Amsterdam Casualty Company, agreed to write such a bond conditioned upon the completion of the said houses free of all such liens, provided the said \$48,000, to be paid by the defendant Maryland Title Company when discounting said notes of the defendant Valentine payable to the order of said defendant Karr, should be disbursed by it, and the whole amount of the said \$48,000 paid to it. The said defendant, the New Amsterdam Casualty Company, in order that it might be assured that the whole of said building loan might be available for the bills of labor and material men in constructing said dwellings." That up to the present time, the proceeds from said loan have been so applied and the balance due these defendants have not been paid them on account of the inability of the Hight Company to collect the balance of said loan owing to the injunction issued in this cause.

33. Said ten houses are now, defendants believe, fully completed, and there is at the present time a balance of said building loan thereupon, undisbursed, in the hands of the New Amsterdam Casualty Company, amounting to \$4,975.00, and your defendants are advised that independently of the truth or falsity of the charges of fraud, misrepresentation and breach of contract made by the plaintiff in its bill against the defendant, Hight, these defendants are entitled to have paid out of said balance, the respective amounts
36 due them for materials and labor furnished in said buildings before any portion of said balance should be applied to compensate the plaintiff for its alleged damage, and that in the circumstances said balance is a trust fund in favor of your defendants.

Wherefore, the premises considered, these defendants pray that a decree may be passed herein declaring the unpaid balance of \$4,975.00 on account of the building loan on the ten completed houses on lots 69 to 78, both inclusive, in square 2063, a trust fund in favor of these defendants and all other creditors of the Hight Company similarly situated, and that these defendants may have such other and further relief as the nature of their case may require.

LOUIS CONRADIS.
THE W. E. THOMPSON CO.,
By EDW. STEVENS, *Treas.*
THE SHADE SHOP,
By W. STOKES SAMMONS, *Mgr.*
V. V. JOCELYN.
ARTISTIC L'T'G SHOP.
V. V. JOCELYN.
INDIANA FLOORING CO.,
By J. G. CHESNUTT.
WALTER G. EISINGER.

HAYDEN JOHNSON, *Att'y.*

DISTRICT OF COLUMBIA, ss:

We, Louis Conradis, Walter G. Eisinger, W. Stokes Sammons, The Shade Shop, V. V. Jocelyn, of the Artistic Lighting Shop, Edw.

Stevens, of the W. E. Thompson Company J. G. Chesnutt, of the Indiana Flooring Co., on oath say, that we have read the foregoing answer by us subscribed and know the contents thereof, and that we verily believe the facts therein stated to be true.

37

LOUIS CONRADIS.
 THE W. E. THOMPSON CO.,
 By EDW. STEVENS, *Treas.*
 THE SHADE SHOP,
 By W. STOKES SAMMONS, *Mgr.*
 ARTISTIC L'T'G SHOP.
 V. V. JOCELYN.
 INDIANA FLOORING CO.,
 By J. G. CHESNUTT.
 WALTER G. EISINGER.

Subscribed and sworn to before me, this 7th day of July, A. D. 1916.

[SEAL.]

WM. H. HOLLOWAY,
Notary Public, D. C.

Motion to Strike Out Amended Joint Answer of Intervening Defendants.

Filed July 20, 1916.

* * * * *

Now comes the plaintiff, The Richmond Park Improvement Company, by its attorney, Daniel W. O'Donoghue, and moves the Court to strike out the amended joint answer of the intervening defendants, Louis Conradis, Walter G. Eisinger, surviving partner of Frank J. Eisinger and Walter G. Eisinger, trading as Eisinger Bros., W. Stokes Sammons, trading as "The Shade Shop", Artistic Lighting Shop, a corporation, The W. E. Thompson Company, a corporation, and Indiana Flooring Company, a corporation, filed herein on the 8th day of July, 1916, and for reason thereof shows to the Court as follows:

1. That said amended joint answer of said intervening defendants sets forth that the alleged contracts under which said intervening defendants attempt to claim was made with a certain "C. B. Hight Company, a corporation", which said corporation is not a party to this suit, and from the record herein has no right, title or interest in or to the fund or funds involved in this suit.

2. That said amended joint answer of said intervening defendants sets forth that certain representations and promises were made by the defendant C. B. Hight "on behalf of himself as well as on
 38 behalf of the Hight Company", which said corporation is not a party to this suit; and that the rights of the plaintiff herein, and the property and funds herein involved, cannot be claimed, taken, or held liable under any, or because of any, such representations and promises from either, or both, of said named parties.

3. That said amended joint answer of said intervening defendants fails to allege that the defendant, C. B. Hight, promised in writing, as required by law, to answer for the debt, default or miscarriage of said "C. B. Hight Company, a corporation", and fails to allege any consideration for any such promise, if any such existed.

4. That said intervening defendants are not indispensable, necessary, or proper parties under the original bill of complaint filed herein; and that their said amended joint answer fails to allege any new matters or facts that show, or tend to show, that said intervening defendants are entitled to be parties to this suit, or entitled to any remedy or relief in this suit against the original plaintiff, or the original defendants, or any of them.

5. That said intervening defendants are not entitled, and have no right, to be parties defendant in this suit except in so far as the new and affirmative matter alleged in their said amended joint answer in the nature of a cross-suit or counter-claim or counter-demand may entitle them thereto; and that said new and affirmative matter in said joint amended answer does not state or allege any matters or facts entitling said intervening defendants to equitable remedy or relief, and, at all events, does not entitle said intervening defendants to any equitable remedy or relief in this cause.

6. That said joint answer of said intervening defendants fails to allege any matters or facts from which a trust could arise, or be declared by a Court of Equity, in favor of said intervening defendants to the assets, funds, or properties in this suit involved.

7. That said amended answer of said intervening defendants fails to allege that said intervening defendants filed notices of Mechanics' Liens as required by law; and that said intervening defendants further admit in their said amended joint answer that the first and second trusts upon the property herein involved were executed and recorded prior to the commencement of the erection of the buildings on said property and that their alleged claims are for labor and materials in the erection of said buildings.

39 8. That said amended joint answer of said intervening defendants prays for affirmative relief in favor of said intervening defendants and all other alleged creditors of said "Hight Company", a corporation, similarly situated, which cannot be granted by this Honorable Court in this suit.

9. That the matters and facts alleged in said joint answer of said intervening defendants are insufficient to entitle them to the relief therein prayed.

10. That the matters and facts alleged in said amended joint answer of said intervening defendants are insufficient to entitle them to any relief in equity.

11. That said intervening defendants have a plain, adequate and complete remedy at law.

DANIEL W. O'DONOGHUE,
*Attorney for the Plaintiff Richmond
Park Improvement Company.*

To Hayden Johnson, Esq., Attorney for Louis Conradis and others,
intervening defendants:

Please take notice that I will call the above motion for hearing before the Equity Division of the Supreme Court of the District of Columbia, on Thursday, July 27th, 1916, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

DANIEL W. O'DONOGHUE,
*Attorney for the Plaintiff Richmond
Park Improvement Company.*

Service of a copy of this Motion and Notice acknowledged this
20 day of July, 1916.

HAYDEN JOHNSON,
*Attorney for Louis Conradis and
Others, Intervening Defendants.*

40

Opinion.

Filed November 20, 1916.

* * * * *

This is a motion to strike out the amended joint answer of intervening defendants.

The intervening defendants rely upon *Anglo-Saxon American Association vs. Campbell*, 13 App. D. C. 581, to sustain their claim. In that case two special circumstances were found by the Court as a basis of the trust there found to have been created by estoppel. One of those circumstances perhaps exists in this case; namely, that the intervenors relied upon the money to be loaned as the source from which they were to obtain payment. But the other circumstance is not here; that is to say, Hight did not build upon the premises in question houses costing the amount which it was agreed they should cost, and it was only by the performance of Hight's agreement that the plaintiffs could have the security for mortgages which they took for the amount of purchase price. The original agreement between the plaintiff and Hight of which the intervenors had knowledge showed clearly on what the plaintiff relied for its security. There is no allegation in the answer of the intervenors to the effect that Hight performed his agreement. Without deciding that a cause of action would have been stated had such allegation been made in the answer, it is sufficient to say that without it the answer is open to attack, and the motion to strike out should therefore be granted.

Settle decree on notice.

By the Court:

WALTER I. McCOY, *Justice.*

41

Stipulation.

Filed January 22, 1917.

* * * * *

It is stipulated between the parties to this cause, by their respective attorneys:

That there remains due to the defendant Maryland Title Guarantee Company, after application of the proceeds of the foreclosure sale of the property involved in this suit under the first deed of trust upon said property to the defendants Charles H. Buck and G. Pitts Raleigh, Trustees, a deficiency of \$1,727.18 in payment of the loan made by that Company; which sum may be paid upon the signing of final decree, regardless of any appeal.

And that there is due to the defendant, The New Amsterdam Casualty Company, on account of the surety bond executed by it as surety involved in this suit, the sum of \$869.66, which sum may be paid upon the signing of final decree, regardless of any appeal.

And that the accrued interest from deposit of the fund of \$9,135.52 involved in this suit and in the possession of the defendant, The New Amsterdam Casualty Company, to date of January 13, 1917, amounts to \$129.10.

ELLIS & DONALDSON,
Att'ys New Amsterdam Casualty Co.
J. J. DARLINGTON,
Att'y for Maryland Title Guaranty Co.
S.
HAYDEN JOHNSON,

Att'y for Interveners.
DANIEL W. O'DONOGHUE,
Attorney for Plaintiff.

with the understanding that all rights of Hight & Co. Inc. are reserved, and that C. B. Hight by stipulating as above shall in no wise be claimed to be acting for or as Hight & Co. Inc. This is signed.

DAN THEW WRIGHT,
Att'y for C. B. Hight Individually and Not Otherwise.

(Endorsed:) Filed in open Court in Chambers January 22, 1917.
Walter I. McCoy, Justice.

42

Final Decree.

Filed January 23, 1917.

* * * * *

This cause came on to be heard on the pleadings, testimony and proceedings herein, and thereupon, upon consideration thereof, it is by the Court this 23d day of January, 1917.

Adjudged, ordered and decreed That the Motion of the plaintiff filed herein on July 20, 1916, To Strike Out the Amended Joint Answer of the Intervening Defendants Louis Conradis, Walter E. Eisinger, surviving partner of Frank J. Eisinger and Walter G. Eisinger, trading as Eisinger Bros. Stokes Sammons, trading as "The Shade Shop" Artistic Lighting Shop, a corporation, The W. E. Thompson Company, a corporation, and Indiana Flooring Company, a corporation, filed herein on July 8, 1916, be, and the same is, hereby sustained, and that the said Amended Joint Answer of said Intervening Defendants be, and the same is, hereby struck out and dismissed;

And it is further adjudged, ordered and decreed That the decree pro confesso against the defendant Harry E. Karr entered herein on September 14, 1916, and the decree pro confesso against the defendant Charles A. Valentine entered herein on October 9, 1916, be, and they each are, hereby made final;

And it is further adjudged, ordered and decreed That the defendant, The New Amsterdam Casualty Company, forthwith disburse the fund of \$9,135.52, together with accrued interest \$129.10 thereon, making a total of \$9,264.62 now in its possession and herein
43 involved, as follows:

To the defendant, Maryland Title Guarantee Company, or to its attorney of record, the sum of \$1,727.18;

To itself, the defendant, The New Amsterdam Casualty Company, the sum of \$869.63;

And to the plaintiff, or to its attorney of record, the residue of said fund and accrued interest to wit, the sum of \$6,667.78;

And it is further adjudged, ordered and decreed That the defendant Clarence B. Hight is liable to the plaintiff in the sum of \$15,140.27 with interest thereon from November 16, 1915, amounting to \$1,076.89, making a total of \$16,217.16, and shall forthwith pay to the plaintiff, or to its attorney of record, the sum of \$9,549.38 in addition to the above-mentioned residue of \$6,667.78 to be disbursed by the defendant, The New Amsterdam Casualty Company, to the plaintiff as above decreed;

And it is further adjudged, ordered and decreed That the defendant, Clarence B. Hight, pay the costs of this suit; and that the plaintiff be, and it is, hereby awarded execution as at law against said defendant, Clarence B. Hight, for said sum of \$9,549.38 together with interest thereon from date hereof, and for costs as aforesaid. To all of which the defendant C. B. Hight excepts.

By the Court:

WALTER I. McCOY, *Justice.*

The defendant C. B. Hight in open court gives notice of appeal and prays the Court to fix the amount of the bond for costs on appeal, which the Court fixes at \$100; and the defendant C. B. Hight
44 further prays the Court to fix the amount of a supersedeas bond on appeal to supersede the aforesaid disbursement of the residue of said fund and accrued interest to the plaintiff or its attorney, which the Court fixes at \$8,250.00.

The six intervening defendants, Louis Conradis, et al., through

their attorney Hayden Johnson, Esq., in open Court note an appeal and pray the Court to fix the amount of the appeal bond for costs, which the Court hereby fixes at \$100.

By the Court:

WALTER I. MCCOY, *Justice.*

Memoranda.

February 15 1917.—Appeal bond approved and filed.

March 30, 1917.—Time for filing record on appeal extended until the first day of May, 1917.

Assignment of Error.

Filed April 23, 1917.

* * * * *

The intervening defendants, assign as reversible error, that the Court erred in sustaining the motion of the plaintiff to strike out the answer of the intervening defendants.

HAYDEN JOHNSON,
Attorney for Intervening Defendants.

45

Designation of Record.

Filed April 23, 1917.

* * * * *

The Clerk will please prepare the record on appeal in the above entitled cause, said record to include:

1. The Bill of Complaint, and Exhibits.
2. Amended Answer of Intervening Defendants.
3. Motion of Plaintiff to strike out the Amended Answer of Intervening Defendants.
4. Final Decree.
5. Opinion of Mr. Justice McCoy on sustaining Motion.
6. Assignment of error.
7. This designation of record.

HAYDEN JOHNSON,
Attorney for Intervening Defendants.

To D. W. O'Donoghue, Esq., Union Trust Building.

DEAR SIR: Please take notice that I have this day filed with the Clerk of the Court the above designation of record on appeal for the intervening defendants.

April 23rd, 1917.

HAYDEN JOHNSON,
Attorney for Intervening Defendants.

46 *Order Dismissing Appeal of Artistic Lighting Shop and
Indiana Flooring Co., Intervening Defendants.*

Filed April 27, 1917.

* * * * * *

Upon consideration of the motion of the plaintiff filed herein on the 26th day of April, 1917, to dismiss the appeal of Artistic Lighting Shop, a corporation, and of Indiana Flooring Company, a corporation, intervening defendants herein, and it appearing to the court that the transcript of record on the appeal of said intervening defendants has not been filed in the Court of Appeals of the District of Columbia, and it further appearing to the court that neither a supersedeas bond, nor a bond for costs on appeal, nor a deposit of money for security of costs, has been given or filed by said intervening defendants, it is by the court this 27th day of April, 1917,

Ordered that the appeal noted by said two intervening defendants on the 23rd day of January, 1917, from the final decree passed herein on the 23rd day of January, 1917, be, and the same is, hereby dismissed.

WALTER I. McCOY, *Justice.*

47 *Plaintiff's Designation for Transcript of Record on Appeal of
Intervening Defendants.*

Filed April 27, 1917.

* * * * * *

The Clerk, in preparing the transcript of record on the appeal of Walter G. Eisinger, et als., intervening defendants herein, will please incorporate in proper chronological order therein, (in addition to the parts designated by said intervening defendants), the following, viz.:

1. The four exhibits (A, B, C and D) filed April 28, 1916, with the Bill.

2. Memo.: "Petition of Walter G. Eisinger, et als., praying to be allowed to intervene, filed June 26, 1916."

3. Memo.: "June 26, 1916, Order of Court allowing Walter G. Eisinger, et als., to intervene as parties defendant."

4. Memo.: "Motion of plaintiff to dismiss intervening petition of Walter G. Eisinger, et als., filed June 26, 1916."

5. Memo.: "Joint answer of Walter G. Eisinger, et als., intervening defendants, to the Bill, filed June 26, 1916."

6. Memo.: "June 27 1916, Order of Court overruling plaintiff's motion to dismiss intervening petition; and plaintiff's exception.

7. Memo.: "Motion of plaintiff to strike out joint answer of Walter G. Eisinger, et als., intervening defendants, filed June 27, 1916.

48 8. Memo.: "July 5, 1916, Decree of Court striking out
joint answer of Walter G. Eisinger, et als., intervening defendants, with leave to file amended joint answer."

9. Opinion of Mr. Justice McCoy, filed November 20, 1916. (This is the same as #5 of intervening defendants' designation, but it should be copies in transcript before said #5 and before #10 hereof.

10. Stipulation filed January 22, 1917.

11. Order of April 27, 1917, dismissing appeal of two of intervening defendants.

12. This designation.

DANIEL W. O'DONOGHUE,
Attorney for Plaintiff.

49

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia hereby certify the foregoing pages numbered from 1 to 48, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 34297 in Equity, wherein Richmond Park Improvement Company, Incorporated, is Plaintiff and C. B. Hight et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of April, 1917.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Ass't Cl'k*.

Endorsed on cover: District of Columbia Supreme Court. No. 3089. Louis Conradis et al., appellants, vs. Richmond Park Improvement Company, Incorporated. Court of Appeals, District of Columbia. Filed Apr. 30, 1917. Henry W. Hodges, clerk.

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1917.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 5 1917

No. 3089

Henry W. Bridges
W. H. H.

LOUIS CONRADIS, ET AL., *Appellants,*

vs.

RICHMOND PARK IMPROVEMENT COMPANY,
INCORPORATED.

BRIEF FOR APPELLEE

DANIEL W. O'DONOGHUE,
Attorney for Appellee.

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, NO. 3089.

LOUIS CONRADIS, WALTER G. EISINGER, SURVIVING PARTNER OF FRANK J. EISINGER AND WALTER G. EISINGER, TRADING AS EISINGER BROS.; W. STOKES SAMMINS, TRADING AS "THE SHADE SHOP," A CORPORATION, AND THE W. E. THOMPSON COMPANY, A CORPORATION, *Appellants*,

vs.

RICHMOND PARK IMPROVEMENT COMPANY,
INCORPORATED.

BRIEF FOR APPELLEE

Statement of the Case

This is an appeal from a decree of the Supreme Court of the District of Columbia, sustaining a motion of the plaintiff, appellee here, to strike out the amended joint answer of the appellants, who were intervening defendants below; and this is the *sixth proceeding in this Court in this same equity cause*. For a history of the previous proceedings in this Court, attention is respectfully directed to the first paragraph of appellee's brief filed in this Court in the pending appeal by the principal defendant, Hight, in case No. 3085.

On April 28, 1916, the Richmond Park Improvement Company, appellee here, filed its original Bill in equity, together with exhibits thereto attached, in the Court below, against the defendant, C. B. Hight, and eight other defendants (R. 2-15).

In view of the fact that the allegations of this Bill are set forth in the said brief mentioned above, and that the allegations of said Bill have been already examined by this Court and set forth in this Court's statement of the case on a former appeal No. 3028, in this same equity cause, *Hight v. Richmond Park Improvement Co.*, 45 App. D. C. 583, only a brief and general statement of the facts alleged in said Bill will be given in this brief,—further reliance on, or fuller quotations from, the exact language of the Bill being reserved for appellee's hereinafter "Argument."

Briefly, the Bill alleges that appellee, under an agreement with the defendant Hight, conveyed to said Hight, or to his "straw-man," the defendant Valentine, its 12 lots in Richmond Park, D. C., free of all encumbrance, under the conditions, or trusts, among others, that Hight was to have the right to place thereon a first deed of trust to secure the sum of \$48,000, in the form of a building loan of \$4,000 for each lot, and *that Hight was to construct on each lot a dwelling costing at least \$5,000*; that is, the houses were to cost not only the full amount of the total first trust building loan, but, in addition thereto, \$1,000 for each house was to be supplied by Hight, making the total cost of construction of the 12 houses \$60,000; and that appellee was to receive no cash for the land it thus entrusted to Hight, but was to receive in lieu thereof \$20,842.50 in notes made by Hight's said "straw-man" Valentine, which notes were to be secured on said 12 lots by *second deed of trust "subsequent only to said proposed building loans"* (R. 4, 13).

That *after* recordation of the deed from appellee to Valentine, and the recordation of the said first and second deeds of trust, which were executed by Valentine, Hight commenced the construction of 12 dwellings on said 12 lots, and that the same were practically completed, but, appellee charged, said dwellings, instead of costing at least \$5,000 each, were of cheap construction, costing, or would cost when fully completed, considerably less than said \$5,000, or but \$3,550 each; that this was a fraud upon appellee in that Hight had fraudulently represented he was going to erect houses costing at least \$5,000 each, and never had any intention of so doing, but intended to erect houses costing but \$3,550 each, and that appellee had relied upon Hight's fraudulent representations in that respect when conveying its said land free of encumbrance to his "straw-man" Valentine, namely, that the lots had been parted with by appellee on the condition or trust that the security for its said *second* trust notes was to be the value of the said lots and 12 dwellings thereon costing at least \$5,000 each; that by the scheme of Hight in erecting houses costing but \$3,550 each, appellee's security for said *second* trust notes was depreciated to the extent of \$450 for each house, or \$17,400 in all; that Hight, instead of using in the construction of said houses an amount equal to the amount of the first trust building loan, \$4,000 for each house, and in addition thereto \$1,000 of his own money for each house; that is, at least \$5,000 for each house, as he should have done under the agreement, was building houses costing but \$3,550 each and was retaining and holding for himself out of the proceeds of said building loan \$450 for each house; that Hight had already received on account of said first trust building loan of \$48,000 "in some instances more than the actual cost of the houses."

That Hight had borrowed the \$48,000 first trust building loan from or through the defendant Karr, who obtained the money therefor by having the defendant, Maryland Title Company, discount the first trust notes made by said Valentine; that said Title Company, before it would advance the \$48,000 on said notes demanded that it be protected by the bond of a surety company, the defendant, New Amsterdam Casualty Company, conditioned upon the completion of the houses free of all mechanics' liens, and that all of said first trust loan of \$48,000 should be paid over to said Casualty Company and disbursed by it; all of which was done; that in loaning this money the Title Company relied upon the personal credit of defendant Karr, and the value of the houses to be erected upon the said lots was not considered to any material extent by the said Title Company; that the defendant Casualty Company "is the party which has in hand the remainder of the said building loan which has not been heretofore advanced to or received by Hight, and that it has in its hands and possession a sum of money, the exact amount of which is unknown to plaintiff, being part of the said building loan of \$48,000," *and that said balance is considerably in excess of the amount required to complete said houses.*

The defendants Raleigh and Buck, trustees, and the defendants Edmunds and Kemp, trustees, were made parties as the trustees, respectively, under said first and second deeds of trust.

The Bill alleges further that the Court should "for the purpose of preventing consummation of a fraud upon plaintiff, *impress a trust upon said balance* (in the hands of said Casualty Co.), in favor of plaintiff, and direct the application of same in such manner as to protect the plaintiff." (R. 11.)

The Bill prays that Hight be restrained, etc., from

receiving said balance, and that Karr, the Title Company, and the Casualty Company, be restrained, etc., from paying over to Hight said balance; for a receiver, for further injunctive relief against Hight in respect to said houses; for discovery, for accounting, and for a decree against Hight, *and for general relief.*

The statements in the opposing brief, as to the facts alleged in the Bill, and as to the purpose of the Bill, are so framed as to omit mention of many of the allegations of the Bill which are most material to appellee's case.

As was said in the former special appeal, 45 App. D. C. 583, 587: "*Upon the filing of the bill a temporary restraining order was granted against all the defendants as prayed.*"

From the statement of facts as set forth by this Court in its opinion dismissing the former special appeal in this case (45 App. D. C. 583), and from "The previous record of this case in this Court" as set forth on pp. 1-4 of appellee's brief filed in the pending appeal in this Court in case No. 3085, it may be seen that after the signing of said restraining order, the defendant Hight moved to dismiss the bill, to modify the said order, etc., which motions were overruled, and that the Court below began the hearing of the testimony on the merits on May 24, 1916.

On June 26, 1916, during the hearing of the testimony on the merits of the cause between appellee and the principal defendant Hight and other defendants who had likewise answered the Bill, the four *appellants appeared for the first time in the cause below*, and with two other corporations filed an intervening petition, for leave to intervene, and leave was granted to the six intervenors to intervene as parties defendant in the cause (R. 15). And, on the same day, appellee promptly filed its motion to dismiss said intervening petition, but before said

motion was formally acted upon by the Court, the joint answer of six intervening defendants was filed in the cause. (R. 16.)

On the next day, however, June 27, 1916 (during said hearing on the merits of said cause), the Court entered an order formally overruling appellee's said motion; and thereupon appellee promptly filed, under Equity Rule 39 of the lower Court, its motion to strike out the joint answer of said six intervening defendants. (R. 16.)

On July 5, 1916, the Court entered a decree striking out said joint answer of six intervening defendants, with leave to file amended joint answer. (R. 16.)

Thereupon, on July 8, 1916, the "*amended joint answer*" of said six intervening defendants (R. 16-20) was filed below, and *it is this answer which is now before this Court on this appeal*. Briefly, this answer, after admitting many, and denying some of the allegations of the Bill, alleges as a cross-bill that the appellants are materialmen, who, under contracts with "C. B. Hight Company" (not with C. B. Hight, the individual who is the main defendant to the original Bill, and said C. B. Hight Company not being at all a party to this cause), had supplied materials and labor in the construction of *ten* of the twelve houses mentioned in the original Bill, and that they have not been paid in full for their said materials and labor; that they knew of the loan contract between the defendants Karr and Valentine, and that said loan of \$48,000 was borrowed by the defendant Hight for the purpose of paying for the building of said houses, and that they had been promised by defendant Hight, on behalf of himself as well as Hight Company, that said loan was to be used for the purpose aforesaid, and that they relied on this representation as the basis of the credit they extended the Hight Company; they further allege, upon information and belief, that the defendants

Karr and Maryland Title Company in making said loan, and New Amsterdam Casualty Company in becoming surety on the bond of the defendant Hight, knew that the loan was negotiated for said purpose, and that appellee possessed the same knowledge.

WITHOUT alleging that the appellants in anywise have even attempted to avail themselves of the beneficial statutory provisions of the Mechanics' Lien Law by filing notices of Liens under said law, and after admitting (R. 17) that the erection of said houses was commenced "SUBSEQUENT TO THE RECORDATION" of the first and second deeds of trust involved herein,

The answer further alleges *that the said ten houses are now fully completed* (R. 19), and that there is a certain fund or balance arising under said first trust loan of \$48,000 in the hands of the defendant Casualty Company, and that, independent of the charges of fraud and misrepresentation which the Bill alleges on the part of defendant Hight, they are entitled to have paid out of said fund or balance the respective amounts due them for materials and labor aforesaid "before any portion of said balance should be applied to compensate the plaintiff for its alleged damage, and that in the circumstances said balance is a trust fund in favor of your defendants." The answer then prays for a decree declaring said fund "a trust fund in favor of these defendants," and for general relief.

While this answer will be fully dissected in the "Argument" of this Brief, it should not at any time be lost sight of that the appellants by the 18th paragraph of their answer (R. 17) "ADMIT THE AVERMENTS" of paragraph 18 of the Bill, and that among the averments of the 18th paragraph of the Bill is the allegation that THE FUND in question, which arose out of the

proceeds of the first trust building loan, "IS CONSIDERABLY IN EXCESS OF THE AMOUNT ACTUALLY REQUIRED TO COMPLETE THE HOUSES" (R. 11), and that the allegations of the 18th paragraph of the Bill were made in respect to all twelve houses, and not simply to the ten houses in which appellants were interested; and that appellants by the 12th paragraph of their answer (R. 17) had previously admitted that all twelve houses "*are now completed,*" the 12th paragraph of the Bill being in reference to all twelve houses (R. 6).

On July 20, 1916, appellee filed its "Motion to Strike Out the Amended Joint Answer" of said six intervening defendants (R. 20-22).

On November 20, 1916, the Justice presiding below, after a full hearing, filed his written opinion, sustaining the motion to strike out the answer (R. 22). No formal order was entered at that time, formally striking out the answer, as the Justice entered only *one* decree, the Final Decree (R. 23-24), in which he disposed of the rights of all the parties to the cause on January 23, 1917. The day before the Final Decree was signed, however, there was a written Stipulation filed in the cause (R. 23), which, among other things, stipulated that it was agreed that the total fund in hands of the defendant, New Amsterdam Casualty Company, was \$9,264.62. *This is the fund or balance arising out of the first trust loan mentioned above, and it is the fund which the appellants say "is a trust fund in favor" of appellants (R. 19), and the fund which appellee says the Court should "impress a trust upon" in favor of appellee (R. 11).*

An inspection of said Stipulation discloses that the real estate involved in this cause was sold under foreclosure proceedings under the first deed of trust, and

resulted in "a deficiency of \$1,727.18 in payment of the loan" of \$48,000 secured on said real estate by the first deed of trust; the date of said foreclosure sale being June 19, 1916, as may be seen from p. 11 of appellee's brief filed in case No. 3085 now pending on appeal in this court.

The Decree, after striking out the amended joint answer of the six intervening defendants, and making final the decrees *pro confesso* which had been theretofore entered against the defendants Valentine and Karr, provides for the payment, out of the said fund in the hands of said Casualty Company (which fund had been thus conserved by the action of appellee in obtaining the injunctive relief granted below in the first instance upon the filing of the Bill), of the deficiency under the first trust, and the indebtedness due defendant Casualty Company on its bond given in connection with the first trust, and then provides that the balance (\$6,667.78) of said fund should be turned over to the appellee as impressed with a trust in its favor; and for the payment by Hight to appellee of the balance of the total amount for which the Court found he was liable to appellee, and for execution in favor of appellee against Hight.

The appellants, however, *by their single assignment of error* (R. 25), *and in their brief*, complain only of that part of the Decree striking out their amended joint answer.

An appeal was noted on behalf of all *six* intervening defendants who signed the answer, but only four, the present appellants, perfected their joint appeal. The appeals of the other two intervening defendants were dismissed below on appellee's motion (R. 26).

The case is here, therefore, on appellants' assignment of error complaining that the lower Court erred in strik-

ing out the answer of the four intervening defendants, the present appellants.

Assignment of Error

Appellants' single assignment of error is as follows:

"The intervening defendants, assign as reversible error, that the Court erred in sustaining the motion of plaintiff to strike out the answer of the intervening defendants." (R. 25.)

Equity Rule 39 of the lower Court, which is identical with Rule 33 of the present rules promulgated by the Supreme Court of the United States for the Federal Equity Courts, provides that:

"Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may * * * test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter."

Appellants make no point in respect to the action of the lower Court in not providing opportunity for amendment of the answer, and, in fact, they could not very well so do, because it is of record that their *first* answer was struck out, with leave to amend (R. 16), and that they thereupon *amended* their answer, the answer now before this Court being their "*amended* joint answer." Knowing that their first answer was struck out for its insufficiency, and with the opportunity to amend, they did not, and could not, present a case in their answer which

was not vulnerable for its insufficiency. If they could have alleged any further or different facts to support their amended joint answer, they unquestionably would have done so. Furthermore, they did not seek further leave to amend, but rested on the decision striking out this answer, and took this appeal therefrom.

Appellants' brief (p. 2), states: "The case having been disposed of upon plaintiff's motion to strike out the defendants' answer, the facts set up in that answer, *as well as the averments of the bill admitted, or not denied by the answer, must, of course, for the purposes of this appeal, be regarded as true.*" This proposition is correct, with the qualification, however, that the facts alleged in the Bill, which are neither admitted, denied, or explained in the answer, or alleged in the answer as not being within the knowledge of appellants, are also "deemed confessed—are admitted. (Eq. Rule 34 of the Court below.)

While appellants' said pleading under the present Equity rules is termed an "answer," under the former Equity rules it would have been, and it is now in effect, a "cross-bill" filed by appellants against appellee. In effect now, and for the purposes of this appeal, appellants' pleading, is a Bill in equity filed against appellee, and appellee's pleading is in effect a *demurrer* to the same. This brings us to appellants' contention that the facts contained in their pleading present a sufficient case for the equitable relief sought by them.

ARGUMENT

Appellants' answer was struck out on account of its insufficiency as matter of law. The argument in appellants' brief (p. 6), asking this Court to reverse the action of the lower Court in sustaining appellee's de

murrer to the *insufficiency* of appellants' answer *as matter of law*, is subdivided into two heads, but in fact presents for consideration three contentions:

APPELLANTS' CONTENTIONS.

First. That, as between appellants and defendant Hight, appellants have the superior equity in the fund.

Second. That appellee's Bill does not present a case for equity jurisdiction.

Third. That, as between appellants and appellee, appellee's equity or trust in the fund should be subordinated to appellants' claims.

APPELLEE'S REPLY.

Appellee replies that appellants' pleading is insufficient as matter of law, and replies to appellants' contentions in their order as follows:

FIRST. That the question as to priority of the claims of appellants and defendant Hight to the fund, is **INSUFFICIENT**, not cognizable in equity, immaterial, a moot question, and can not be raised on this appeal.

SECOND. That appellee's Bill unquestionably presents a case for equity jurisdiction, and that appellants can not demur to the Bill for the first time in an appellate Court.

THIRD. That appellants' claim in the fund is not cognizable in equity, or, at all events, not as against the appellee; and that, if appellants' claim is cognizable in equity, then, as between appellants and appellee, the appellee has the paramount equity or trust in the fund.

FOURTH. That appellants' above-stated three contentions all assume that appellants' alleged claims in the fund are cognizable in equity, and that, before this Court should be called upon to decide any question of priority of appellants' claims, appellants must first show that their claims in the fund are cognizable in equity.

Appellee will now take up for discussion each of its above stated Four Replies to appellants' contentions, in their respective order.

FIRST

EQUITY IN THE FUND AS BETWEEN APPELLANTS AND HIGHT.

Appellee first replies that appellants' pleading is insufficient—that before this Court should be called upon to decide any question of priority of appellants' alleged claims to the fund, appellants must first show that those claims are cognizable in equity. Appellee's Third and Fourth Replies, pp. 19-62 hereof, clearly establish that appellants' alleged claims are not cognizable in equity.

Appellee does not feel that it is incumbent upon it to answer, in detail, this first and immaterial contention of appellants, namely, that their equity in the fund is superior to Hight's. Appellee holds no brief for either side on that contention, because appellants' brief (p. 7) admits that this contention leaves "*out of consideration * * * the supposed equities of the appellee.*" The sophistry of this first contention on the part of appellants is, therefore, apparent. It is manifest that, if appellee's equity in the fund is superior to any supposed equity of Hight, and is likewise superior to any supposed equity of appellants,—if appellee's equity in the fund is superior to all other supposed equities,—*then*, even conceding that appellants have an equity superior to that of Hight, such concession does not destroy the priority of appellee's equity over appellants' equity. Therefore, the real question on priority is: As between the appellants and the appellee, who has the superior equity in the fund? Appellants should not

be permitted to obscure the issue by presenting on this appeal another and immaterial issue as to the priorities of the respective equities of Hight and appellants.

It being admitted from appellee's Bill and appellants' Answer that appellee's total claim against Hight is about three times the amount of the entire fund involved herein, it would be a vain and useless thing for the Court to undertake to decide the moot question of priority as between appellants and Hight. If appellee has a priority of trust over both, then the *entire* fund is impressed with *its* trust, and there is no fund, or part of fund, left for the other two rival claims.

Appellants' answer (R. 19) recognized the situation in that its only allegation as to priorities of trust between the parties to the cause is as follows: "These defendants are entitled to have paid out of said balance the respective amounts due them * * * before any portion of said balance should be applied to compensate the plaintiff." And also see the argument in appellants' brief.

That, as between Hight and the appellee, the *entire* fund in question is impressed with a trust in favor of appellee, is clearly shown in appellee's brief filed in the main appeal in this case,—that of Hight v. this appellee, Case No. 3085, now pending in this Court,—and it is also shown in said brief that, if the fund involved had been three times the amount it is, it would have taken all of that three times amount to satisfy appellee's claim against Hight. Therefore, there can be no issue for determination on this appeal of these appellants, intervening defendants below, as to whether or not Hight was entitled to any of the fund involved as against the appellee, or as to whether or not, after appellee's trust in the fund was satisfied, Hight's claim to any then remaining balance of the fund should be

subordinated to appellants' equity, but the sole priority presented for determination is: As between the appellants and appellee, who is entitled to the priority of trust or equity in the fund in question.

SECOND

THE BILL MAKES OUT A CASE FOR EQUITABLE RELIEF.

Although the Record discloses that appellants never attempted to raise in the lower Court *any* question as to the right of appellee to be heard in a court of equity on the facts alleged in its Original Bill, and that appellants, after obtaining leave to intervene below as parties defendant (R. 15), filed their answer (R. 16-20) without making any such contention previous thereto or therein, and their single assignment of error (R. 25) makes no such contention, yet their *brief* (p. 6, 9 et seq.) on this appeal contends that appellee's remedy "is at law and not in equity," and cites one text-book and two cases thereunder.

Appellee replies to this *new* contention of the appellants, which has thus been raised in the Appellate Court *for the first time*, as follows:

First, that the text-book cited by appellants does not bear out their contention, and the two cases have no application to the situation presented by the Bill in the case at bar, viz:

In quoting from Bispham on Equity Jurisprudence, Sec. 200, appellants neglect to quote the pertinent concluding language of said action, and also the following section, namely:

"Sec. 200 * * * Where from any circumstance whatever, as for mere discovery alone,

chancery has once obtained jurisdiction, it will go on and do complete justice in the case.

"Sec. 201. As the jurisdiction of equity embraces (with the qualifications already stated), fraud of all kinds, it affords relief in many instances in which no grounds for redress whatever exist at law. In such cases, therefore, its jurisdiction is exclusive, and the only remedy which the injured party can have is by bill in equity. Thus, a great many transactions are *presumed* to be fraudulent in equity which are not so in law, where the rule is that fraud must be proved, and cannot be presumed. In equity fraud may be inferred from attendant circumstances; it may be presumed from the subject-matter of the contract; or from the relation of the parties: * * *"
See also Sections 205, 214, 215, 218.

In the case of *Insurance Co. v. Bailey*, 13 Wall. 616, cited by appellants, the Insurance Co. filed a bill in equity for the delivery up and cancellation of a policy of insurance it had issued to defendant on his alleged fraudulent representations, and the bill was "dismissed, without prejudice" because the fraudulent representations were a good defense to any action brought by the defendant on the policy, and there was no allegation that the holder of it meant to assign it, and because suit at law on the policy had, in fact, been instituted after the filing of the bill in equity.

And, the case of *Curriden v. Middleton*, 232 U. S. 633, cited by appellants, involved a patent, and the alleged fraudulent formation of a company in regard to exploiting the same, and the Court, while holding that mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction, and that the proper

remedy for damages caused by fraud and deception is an action at law, was very careful to also state that in the case there before it "*there is no attempt to follow a specific fund or to establish a trust.*" Quite different from the case at bar.

Second, appellee replies that the statements in appellants' brief (p. 6, 9-10) in speaking of the facts in the instant case, such as:

"The relief sought by the plaintiff being merely damages for an alleged breach by Hight of his contract, its remedy is at law and not in equity," etc.;

and

"the only remedy sought by the plaintiff being damages for the supposed breach by Hight of his contract," etc.;

and

"the plaintiff is not claiming any specific equity in the fund in controversy," etc.;

and

and the quotation of only *one* of the many prayers of the Bill,

are so erroneous, misleading and directly contrary to the facts alleged in the Bill and admitted by appellant's answer, and so absolutely at variance with what this Court in *Hight v. Richmond Park Impr. Co.*, 45 App. D. C. 583, has already authoritatively stated to be the facts and purpose of this same Bill (as more fully shown in appellee's brief filed in this Court in the appeal by the principal defendant, Hight, Case No. 3082 now pending in this Court), that appellee does not deem it necessary to do more here than simply to refer to its other said brief, pp. 4-9, 55-63.

Third, appellee replies that appellants' argument on their *present* contention, that appellee's Bill does not present a case for equitable relief, is so fully refuted by appellee's other said brief (in said Case No. 3085), that it is only necessary, in addition thereto, to call attention here to the fact that appellants' argument on this point, being an attack on the jurisdiction of the equity Court below to entertain the Bill, is in effect a demurrer, or motion to dismiss under the present rules, and, therefore, it is interposed too late, the appellants having answered the Bill without reserving the point in their Answer, or more properly raising it before answering; see Eq. Rule 32 of Supr. Ct., D. C.; U. S. Trust Co. v. Blundon, 42 App. D. C. 500, 506-7; and what was said in Tyler v. Moses, 13 App. D. C. 428, 443: "The rule as stated in 1 Daniell's Chancery Practice, 555 * * * if a defendant in a suit in equity answers and submits to the jurisdiction of the Court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity."

Fourth, appellee replies, that appellants having requested and obtained leave, over the objection of appellee, to intervene as parties in this cause (not having been served with process to appear, but appearing as voluntary parties in this cause) they are hardly in a position to raise in an appellate court, or even in the lower Court, any question as to the jurisdiction of the Court to entertain the Bill.

Therefore, appellants are limited to their contention of record, namely, *the sufficiency of the answer as matter of law.*

THIRD

APPELLEE'S TRUST IN THE FUND IS SUPERIOR TO APPELLANTS' CLAIMS.

Appellants' third contention is that appellee's trust or equity in the fund should be subordinated to appellants' claims. Appellee demurred below (R. 21) to appellants' answer as being *insufficient in law*, on the grounds, among others, that appellants' claims are not cognizable in equity, and renews its demurrer in this Court, under its Fourth Reply, pp. 54-62 hereof.

Appellee respectfully submits that its trust or equity in the fund is paramount to appellants' claims, even if it be conceded (which appellee does not admit), that a court of equity has jurisdiction to entertain said claims. And appellee further submits that, even if said claims of appellants are cognizable in equity, the decree of the lower Court should not be reversed, because if appellee's trust or equity in the fund is paramount to appellants' equitable claims therein, then appellee's right to the entire fund is exclusive,—its trust or equity in the fund is co-extensive with the amount of the entire fund, because, if the amount of the fund had been three times the amount it is, it would have taken all that three-times amount to satisfy appellee's trust or equity. If appellee's trust is superior to appellants' claims, there is no part of the fund left for appellants. Therefore, the lower Court's ruling can be sustained upon either one of two grounds, without the necessity of a decision by this Court on the other; namely, *first*, if appellants' claims are not cognizable in equity, there is no basis for a ruling by this Court on the question of priority of equity in the fund as between appellants and appellee; and, *second*, if appellee's trust or equity in the fund is

paramount to appellants' claims therein, then there is no necessity for this Court to do a vain and useless thing, decide a moot question,—to decide whether or not the lower Court did or did not hold that appellants' claims were cognizable in equity, and reverse the decree if this Court is of opinion that the lower Court held the claims were not cognizable, and that such ruling was erroneous. If appellee's trust in the fund is superior to that of appellants' therein, there is no fund left for appellants' equity. The situation presented on this aspect is analogous to a sale under a first trust, where there is also a second trust on the property, and the sale results in a deficiency under the first trust. The holder of the second trust notes no longer holds a trust on the property, the security has been exhausted by the first trust.

Anglo-American Assn. v. Campbell, 13 App. D. C. 581.

We will show, however, that appellee's trust is paramount to appellants' claims.

The sole argument advanced by appellants in support of their contention (that the fund involved herein "is a trust fund in favor" (R. 19) of appellants, or, more correctly, the contention advanced in their brief (p. 6), that the said fund should be impressed with a priority of trust or equity in their favor paramount to a trust or equity in favor of appellee), is that, under the decision of this Court in the case of *Anglo-Amer. Assn. v. Campbell*, 13 App. D. C. 581, the lower Court erred in striking out their answer; in other words, that the lower Court erred in holding their pleading did not present a sufficient case to establish a priority of trust or equity in the fund involved in this appeal as against the appellee.

It will not escape attention that, while the fund be-

low, which was tied up and conserved in the hands of the defendant New Amsterdam Casualty Company, amounted to \$9,264.62 (R. 23, 24), the amount of the fund involved on this appeal is \$6,667.78, because out of the total amount of said \$9,264.62 (as stated in appellants' brief, p. 8), "the Maryland Title Company, which made the loan, and the New Amsterdam Casualty Company, the surety, have been satisfied in full, as appears by the Stipulation of Counsel" (R. 23). Therefore all questions as to any claims of the defendants, the Maryland Title Company, the Casualty Company, and Raleigh and Buck, trustees, under the first deed of trust, have, under said Stipulation, been eliminated from this appeal; and any possible claims of defendants Valentine and Karr were eliminated by the decrees *pro confesso* against them which were made final in the Final Decree (R. 24) without any appeal having been taken by said two defendants, and the defendants Edmunds and Kemp, trustees under the second deed of trust, have acquiesced in the Final Decree as it impresses a trust upon the fund in favor of the appellee, the beneficiary under said second deed of trust. Therefore, the only parties *in this Court* interested in the fund in both the appeals now pending (this appeal and case No. 3085) are the appellants here, the appellant Hight in the main appeal, and the appellee here which is likewise the appellee in Hight's appeal. And, on this appeal, the sole question for determination is, as hereinbefore stated: As between the appellants and the appellee, who is entitled to the priority of trust or equity in the fund?

The case of Anglo-Amer. Assn. v. Campbell, 13 App. 581, (hereinafter called the Assn. case) is the only authority relied upon in appellants' brief, and, therefore, when the appellants insist, as they do, that the facts

in the case at bar bring them within the benefit of that decision of this Court, the first step in reaching a conclusion on their appeal is to see whether or not a case of the same "special circumstances" as there existed is presented here. Such an analysis is especially important since that case was somewhat unusual in that it was absolutely without precedent directly in point, in holding that its facts or circumstances entitled the prevailing party to a trust or priority of trust on the fund therein involved, and seemed to be in the teeth of the statutory provisions of the Mechanics' Lien Law. Mr. Justice Shepard, in delivering the opinion in that case, after having summed up "the special circumstances disclosed in the evidence" (p. 599), and "the special circumstances relied on to create the trust," was very careful to announce (p. 604) that:

"The researches of counsel, likewise our own, have failed to discover any decision directly in point to guide us in reaching the conclusion at which we have arrived in this case,"

and to state that the facts in that case were "*novel*."

The opinion of Mr. Justice McCoy, filed in this cause below (R. 22) shows that all of the "special circumstances" of the Assn. case do not exist in the case at bar. If Mr. Justice McCoy was correct in so finding, then his action (R. 24) in striking out appellants' amended joint answer was likewise correct, and should be sustained by this Court.

In other words, unless *all* of the *essential* "*special circumstances*" relied upon by the prevailing party in the Assn. case are present in the case at bar (and we respectfully submit that we will show that they are not), *and unless further* there are no facts present in the case at

bar which, if present in the Assn. case, would have defeated the party who prevailed there on account of the absence of such facts (and we respectfully submit that in the case at bar such facts are present which were not present in the Assn. case), then the case at bar does not come within the decision of the Assn. case to the extent of supporting appellants' contention, but, on the contrary, the Assn. case, if applicable at all here, clearly supports appellee's contention.

Therefore, let us now analyze the Assn. case and the case at bar, and then make a comparison of the facts, in order to see that all the essential "special circumstances" of the Assn. case are not present in the case at bar, and that hence the Assn. case is not controlling here to the extent of sustaining appellants' position, but, on the contrary, if applicable here at all, it supports appellee's position due to the facts which exist here and which did not exist in the Assn. case.

A thorough analysis of the Assn. case requires a careful examination of the printed *Transcript of Record filed therein in this Court*, in addition to a consideration of the facts and law as set forth by this Court in its opinion in that case.

First of all, let us see who were all the parties in the Assn. case as compared to all the parties in the instant case, and what was the *res*, or fund, involved in each case.

In the Assn. case, the original bill in equity was filed by Campbell, a material man who had filed Notice of Mechanics' Lien on the realty involved, and who there occupied the status attempted to be occupied here by the appellants (although the appellants here have not filed any Notices of Liens). The Bill was filed against:

The defendant Lea (who occupied there a somewhat analogous but not precisely similar status as

Hight here [Valentine being a "straw-man" for Hight].)

The defendant Anglo-Amer. Assn. (which occupied there a somewhat analogous but not precisely similar status here as the Maryland Title Co., or Karr) ;

The defendants Newman & Mercer (who occupied there a somewhat analogous, but not at all similar, status as the appellee here) ;

The four defendant trustees (under the first and second deeds of trust, respectively, as the four defendant trustees here) ;

but there was no party in Assn. case in the status similar or analogous, to the defendant Casualty Company here. Also, there the fund (\$3,000) was in the possession of and was retained by the beneficiary under the first deed of trust, the Anglo-Amer. Assn., out of the total amount (\$46,500) it had agreed to loan, and for which amount it held the recorded first deed of trust on the property involved. Here, *the fund*, although arising under the proceeds of the first deed of trust on the property involved, *has not been retained by the beneficiary*, of the first deed of trust, but, on the contrary, *has been parted with by said beneficiary, and is in the hands of the Casualty Company.*

Having before us this skeleton outline of the Assn. case as compared to the case at bar, let us now see what facts in the Assn. case may be said to correspond with similar facts in the case at bar.

In the Assn. case, Newman & Mercer deeded certain real estate to Lea, and Lea immediately executed a *first*

deed of trust on the said realty to secure the Anglo-Amer. Assn. a building-loan of \$46,500, and Lea then executed a *second* deed of trust on said realty to secure his vendors, Newman & Mercer, in the sum of \$6,157, "part of the purchase price" of said realty. The deed and the two deeds of trust were recorded before any work was commenced on the houses which were erected on said realty.

The first deed of trust was a building-loan and was borrowed by Lea for the purpose of constructing five dwellings on said real estate.

Campbell was a materialman who had furnished lumber, etc., for the construction of said houses, for which he had not been paid in full. Campbell, in contracting to furnish said material, knew that the first trust was a building-loan negotiated by Lea for the purpose of paying for the houses to be erected by him. That is, said money was borrowed by Lea to pay for labor and materials used in building said houses, and Campbell knew of the loan contract before furnishing said material, and was promised by Lea that the loan was to be used for said purpose, and Campbell relied on this promise as the basis of credit to Lea; that the Anglo-Amer. Assn., in making the loan, knew that it was being negotiated for the purpose of constructing the houses, and that the proceeds of the loan were to be applied to the payment for materials and labor used in said houses; and the party, against whom priority of trust in the fund was sought, possessed the same knowledge.

The houses were completed; and there was a certain fund arising out of the proceeds of the first trust loan in the hands of one of the parties defendant, which fund Campbell sought to impress with a priority of trust in his favor for the payment of his unpaid bill for material.

Having now a general outline of the Assn. case, and

having seen that, on first impression, it would seem to support appellants' claim for priority in the fund involved herein, let us now take up some of the essential differences between that case and the case at bar, which differences clearly show that the Assn. case can not be cited as authority supporting appellants' contention that, as between appellants and appellee, appellee's equity in the fund should be subordinated to that of appellants.

DIFFERENCES

BETWEEN THE ASSN. CASE AND THE CASE AT BAR.

1. Priority of trust not sought against same party in the Assn. case as here.
2. The second trust in the Assn. case was paid, but in the case at bar no part of appellee's second trust has been paid.
3. In the Assn. case the houses cost the full amount of the building loan, but in the case at bar the houses cost considerably less than the full amount of the building loan.
4. In the Assn. case the materialmen had filed Mechanics' Liens, but in the case at bar the materialmen have not filed such Liens.
5. The contracts of the materialmen to supply material in the Assn. case are not similar to the contracts of the materialmen in this case.
6. The agreement to subordinate the purchase money trust to that of the building loan in the Assn. case is not at all similar to the agreement in the case at bar.
7. The contract between the lender and the borrower of the building loan in the Assn. case is not similar to such contract in the case at bar.
8. In the Assn. case, the party who claimed priority in the fund as against the materialmen had previously thereto directly disbursed the building loan to the materialmen; but in the case at bar the appellee has had no dealings, directly or indirectly, with the materialmen.
9. The fund involved in the Assn. case was not at all similar to the fund involved in the case at bar.

Let us now take up each of these differences between the two cases, as set forth above, and see that they are borne out by the facts and circumstances appearing of record in the two cases.

1.

PRIORITY OF TRUST NOT SOUGHT AGAINST
THE SAME PARTY HERE AS IN THE ASSN.
CASE.

In the Assn. case the contention of priority was between the materialmen and the lender of the first trust building loan, and it was held that the materialmen were entitled to priority of trust in the fund as against the said lender.

Here the dispute as to priority is between the appellants, materialmen, and the appellee, the beneficiary under the recorded second deed of trust.

And, in this connection, if it should be said, notwithstanding what is set forth hereinbefore on pp. 13-15, that the dispute on this appeal is not only as to whether appellee's trust should be subordinated to the claim of appellants, but is also as to whether Hight's claim should not likewise be subordinated to that of appellants, it is well to here recall that the precise contention of appellants' answer (R. 19) is, viz.: "These defendants are entitled to have paid out of said balance the respective amounts due them * * * before any portion of said balance should be applied to compensate the plaintiff."

Turning again to the discussion of the difference as to parties mentioned above, we see further that, in the Assn. case, the party against whom priority of trust in the fund was allowed, was not only the lender of the first trust building loan, but was the party who had in his possession, and was retaining a part of the total amount of the loan he had agreed to advance as a building loan. From the reasoning of the opinion in that case (p. 600), it is readily seen that, since the houses

had been completed and had cost \$46,500, the full amount of the building loan, the lender of that loan could not in equity complain of the material men being paid out of that part of the said loan which it still had retained in its hands. All that the lender was entitled to was to have completed houses costing the full amount of the sum it had agreed to loan, because if the houses cost the full amount of said loan the lender was receiving thereby *all* the security for the loan to which it was in equity entitled, and it would have been inequitable to allow lender to have not only the full measure of the agreed security for its loan, but also to keep back part of the loan.

In the case at bar, however, on the admitted facts, the appellee has not only never had in its possession or control any part of the first trust building loan, but it did not receive the full measure of the agreed security for its second trust notes. *The appellants admit* (R. 17) the 18th paragraph of appellee's Bill, and the conclusion of said 18th paragraph (R. 10) is the allegation that there is in the hands of the Casualty Company a certain sum of money, being part or balance of the first trust building loan of \$48,000; that is, the fund herein involved, and which fund "IS CONSIDERABLY IN EXCESS OF THE AMOUNT ACTUALLY REQUIRED TO COMPLETE SAID HOUSES" (R. 10). The significance of this admission, when taken into consideration with the other facts in the case, is at once apparent, namely: Said 18th paragraph of the Bill was in reference to all 12 houses, and likewise paragraph 12 of the Bill (R. 6) was in reference to all 12 houses. By their admission in the 12th paragraph of the answer (R. 17) appellants admit that all 12 houses are completed, and, therefore, have admitted that the fund in question is not only in excess of the actual cost of the ten houses,

for which they supplied materials, but also in excess of all 12 houses. While their answer (parg. 33, R. 19) alleges that the fund in the hands of Casualty Company on account of the building loan for *ten* houses is \$4,975, they further admit by the Stipulation of record (R. 23) that the total amount in the hands of the Casualty Co. on account of all 12 houses was \$9,135.52. Therefore, *the appellants have admitted that the ten houses at any rate cost no more than \$40,000 less \$4,975, or no more than \$3,502.50 each, and that the other two houses at any rate cost no more than \$8,000 less \$9,135.52 minus \$4,975, or no more than \$1,929.75 each; or, taken another way, if said \$9,135.52 is to be taken as applying to all 12 houses equally, then at any rate, the appellants have admitted that each of the 12 houses cost no more than \$48,000 less \$9,135.52, or no more than \$3,322.04 each OR LESS THAN THE CHEAP COST (\$3.550 each) CHARGED IN THE BILL.*

The appellants have also admitted by the 4th and 5th paragraphs of their answer (R. 16), that the agreement referred to in the fourth paragraph of the Bill (see Exhibit A; R. 12-14) was executed between the appellee and the defendant Hight, and that appellee's land was obtained by Hight "upon the terms" (R. 16) mentioned in said agreement, namely, upon the conditions, among others, that said land was conveyed to Hight "free of encumbrance," *and that Hight, in placing a first deed of trust building loan on each of the twelve subdivision lots was bound by the limitation that each building loan for each lot should "not exceed four-fifths of the cost of the contemplated improvements."* In other words, if Hight borrowed a \$4,000 building loan on each lot, then, under the agreement, he was to put on each lot a house costing at least \$5,000, which meant that in addition to the amount of the build-

ing loan Hight was to place in each house, out of his own money, at least one-fifth of the total cost of the house. Now, even if it be said (which appellee does not admit), that the said admissions of appellants as to the execution of said agreement and the obtaining of the land by Hight "upon the terms therein mentioned" (R. 16), do not have the effect of admitting that appellants knew about this agreement between appellee and Hight at the time appellants contracted to supply, and in supplying, materials for the houses, nevertheless appellants are forced to admit that they did know, at said time of so contracting and supplying, that the first deed of trust to secure Karr in the sum of \$48,000, and the second deed of trust to secure appellee in the sum of \$20,842.50 "purchase money," were both of record, because the mere recordation of the same (R. 5-6, 16) was sufficient notice to bind them with knowledge of the recordation of those conveyances *and their contents*. The appellants further admit (R. 17) that the erection of the houses was commenced subsequent to the recordation of said conveyances; in other words, the first and second trusts were recorded *before* appellants *supplied any materials* for the houses. The appellants further admit (R. 18) that before supplying any materials for the houses they knew that said first trust of \$48,000 was a *building loan*, secured \$4,000 on each of the twelve lots, and that they knew about the negotiation of said loan. (R. 5, 9, 17-19.)

It is respectfully submitted that, before supplying materials for the houses, the appellants had actual knowledge that each lot was burdened with a *first* trust building loan of \$4,000, and were charged with knowledge that all twelve lots were burdened in addition with a *second* trust to secure appellee \$20,842.50 "purchase money" and appellants should be held by this Court to

be charged with what should have naturally, and must have, suggested itself to appellants' minds, namely, that there was some sort of an arrangement or agreement between appellee and Hight whereby appellee had agreed to subordinate its "purchase money" trust to that of the building loan,—that, even if appellants did not at that time know all the details or precise conditions of that agreement, they should, at least, be charged with the knowledge of the existence of some sort of an agreement of that nature, and further charged (*especially in view of their admitted knowledge that the first trust was a building loan*), with a knowledge or realization of the terms of such agreement at least to the extent that they must have known or realized one of the terms of such agreement must have been that appellee's security under its second trust was to be improved with twelve buildings, each costing at least the full amount, \$4,000, of the first trust building loan for each lot. The Transcript of Record in the Assn. case does not contain the agreement in that case, nor any reference to it, and yet this Court easily inferred (p. 585) :

“There was some arrangement, the particulars of which do not appear, by which Lea's grantors agreed to postpone the lien for the remainder of the purchase money to that in favor of the Association; and in accordance therewith the dates of their notes and trust deed were given as before stated.”

It follows, therefore, that appellants, in asking that their unpaid bills for materials be given priority over appellee's trust, are asking a court of equity, the court of conscience and arbiter of equitable claims, to give them the priority of equity before appellee's trust in

a fund derived out of appellee's land, notwithstanding the fact that appellants, before supplying said materials, knew that the property was subject to a first trust of \$48,000 and a second trust of \$20,842.50, and must be presumed to have known that the vendors of the said land had subordinated their trust to that of the first trust on the agreement that each of the twelve lots was to have an improvement thereon costing at least \$4,000, and notwithstanding, further, that appellants, in pressing their claim, admit in the same pleading that the improvements on each lot cost either less than \$3,502.50 or less than \$3,322.04 (depending on which way their admissions are taken),—or, taking the figures more favorable to appellants,—the appellants admit that the total amount of the building loans for the ten houses, for which appellants supplied part of the materials, exceeded the actual cost of said ten houses by more than \$4,975—said \$4,975 being the exact amount which appellants say in their answer is in the hands of the Casualty Company, and being the fund which appellants say should be used for their unpaid bills for materials rather than impressed with a trust in favor of the appellee, whose security for its second trust notes has been depreciated for said ten houses more than said \$4,975, according to appellants' own admissions, and whose security, as a matter of fact, was depreciated in addition thereto by the sum of \$10,000 due to the fact that Hight never used in said houses \$1,000 each over and above the amount of the building loans as he had agreed to do.

The appellants allowed Hight to have received on or before April 28, 1916, on account of the building loan for said 10 houses more than sufficient to fully complete the same, and from then, without at any time filing Notices of Liens or endeavoring to avail themselves of

the provisions of the Mechanics Lien Law, and with knowledge of the above-mentioned facts, waited until after June 19, 1916, when the houses were sold at foreclosure under the first trust, to appear in this case for the first time on June 26, 1916, and ask the Court to give them the fruits of appellee's diligence—the fund which had been conserved since April 28, 1916, by the injunctive relief granted at the instance of appellee.

It is respectfully submitted that the appellee in the case at bar does not stand in the same position, or status, as the defendant Association in the Assn. case, and that the ruling of this Court (in there holding that the materialmen had an equity in the fund there involved superior to the defendant Association, the lender of the money which was retaining the fund), does not support appellants' contention in the case at bar that, as between the appellants and the appellee, the appellants have a prior equity in the fund, but, on the contrary, by the doctrine of equitable estoppel therein laid down, supports appellee's priority of equity or trust in the fund.

2.

THE SECOND TRUST IN THE ASSN. CASE WAS PAID, BUT IN THE CASE AT BAR, NOTHING HAS BEEN PAID ON THE SECOND TRUST HELD BY APPELLEE.

In making a comparison of the Assn. case with the case at bar, and after seeing that the Court in the Assn. case held that the "special circumstances" in that case constituted an equitable estoppel operating against the beneficiary of the first trust, the next question that naturally arises is, What was the ruling of the Court as to priority in the fund as between the materialmen and the

beneficiary under the second trust? This inquiry is a pertinent one, because in that case the beneficiary and the trustees under the second trust were named as parties defendant to the cause, and yet the opinion of this Court makes almost no mention of the beneficiary under the second trust. It is thought that an explanation of the relation of the holder of the second trust to the fund there involved, will conclusively dispose of appellants' contention on this appeal. From an examination of the Transcript of Record, it appears that in the Assn. case, the pleadings of *all* the materialmen (the original bill of complaint, and the intervening petitions) were all framed on the assumption that *the second trust had been paid*, but not released of record, and the said pleadings seem to be also predicated on the theory that the materialmen would not have an equity in the fund superior to that of the second trust unless the second trust had been paid, as may be seen from the following excerpts from the pleadings (the references to pages of Record being to the Assn. case Record):

Campbell's original bill of complaint (R. 6):
 "Your complainant upon information and belief avers that the indebtedness secured by the (second) deed of trust * * * has been fully paid to the persons entitled thereto, but has not been released of record; *therefore*, your complainant charges and avers that his lien should be satisfied and paid in preference to said satisfied deed of trust."

Intervening Petition of one Johnson, materialman (R. 13) adopts allegations and prayers of original Bill, and then alleges: "Your petitioner says that the trustees * * * under * * * the second deed of trust, have advertised the

property for sale; * * * that your petitioner * * * avers that the indebtedness secured by the said second deed of trust has been fully paid, and that notwithstanding such payment the said property is now offered for sale and is to be sold in order that they may relieve said property of your petitioner's lien, as well as other liens, but as your petitioner is advised and believes, and therefore avers, that any such sale will be null and void, for the reason that no default has occurred in payment of the indebtedness secured by said second deed of trust, but, on the contrary, the same has been fully paid."

Answer of Lea (R. 23) : "This defendant says that since the filing of said bill the hereinbefore described real estate was advertised for sale by * * * trustees under the said second deed of trust, and at said sale said property was bid in * * * **AND FOR A SUM SUFFICIENT * * * TO COVER BOTH THE INDEBTEDNESS SECURED BY THE FIRST AND SECOND TRUSTS** * * * (and bid in by the holders of the second trust) * * * that by reason of said sale the indebtedness secured by the hereinbefore described second deed of trust was extinguished."

The answer of Mercer & Newman, beneficiaries under said second deed of trust (R. 32-3) denies that all of the second trust had been paid, *but*, as this answer does not even mention said auction sale which had been alleged in prior pleadings, or contain any reference thereto, it is submitted that the former allegations as to Mercer & Newman having bid in the property at a sum sufficient to cover both the first and second trusts, and that

the second trust was extinguished thereby, must have been taken as admitted by the Court. Mercer & Newman do not appear to have taken any part in the hearing of testimony, nor to have been named in the Final Decree, nor did they appear in this Court, and it is to be assumed their trust was satisfied.

The mere statement, that in the Assn. case the second trust was paid, and that in the case at bar no part of the second trust has been paid, is sufficient argument to establish the proposition that the Assn. case cannot be applied as controlling authority here on the dispute between the materialmen and the holder of the unpaid second trust, to the extent of supporting appellants' claim.

3.

IN THE ASSN. CASE THE HOUSES COST THE FULL AMOUNT OF THE BUILDING LOAN, BUT IN THE CASE AT BAR THE HOUSES COST CONSIDERABLY LESS THAN THE FULL AMOUNT OF THE BUILDING LOAN.

In the Assn. case the houses cost the full amount of the building loan.

We have already seen that in the case at bar the Bill alleges that the houses cost but \$3,550 each to construct, and we have further seen from the admissions in the answer (see 30, 33 hereof) that appellants admit that the houses cost less than \$3,322.04 (or less than \$3,502.50) each to construct; and it is likewise admitted that the amount of the building loan for each house was \$4,000, and that the houses have been completed.

In view of this admission on the part of appellants, that **THE HOUSES IN THE CASE AT BAR DID NOT COST THE AMOUNT OF THE BUILDING LOAN**, there can be no question but that, under the authority of the Assn. case, as between appellants and appellee, the appellee has the superior equity or trust in the fund in question. Mr. Justice Shepard in delivering the opinion in the Assn. case said (p. 600), in effect, that if the holder of the first trust could have proved that the houses did not cost the amount of the first trust building loan, that would have been a good defense to the materialmen's contention for priority of equity in the fund there involved, the inference being the beneficiary of the first trust would have had a priority of equity in so much of the fund as was equal to the difference between the full amount of the building loan and the less amount of the actual cost of the houses. It is apparent, as we have hereinbefore pointed out, pp. 28-29 hereof, that the lender of the building loan could not in equity complain of the materialmen being paid out of the balance of the building loan which the lender had not advanced to the borrower, but was retaining itself. All that the lender of the builder loan was entitled to have was completed houses costing the full amount of the sum it had agreed to loan as building loan, because, if the houses cost the full amount of that building loan and the lender notwithstanding retained part of the amount of the loan, the lender would be in the inequitable position of having both the agreed upon security for the loan and at the same time part of the proceeds of the loan. But, in the case at bar, it is admitted that the houses are completed and that they cost considerably less than the amount of the building loan, and that the appellee is the holder of the recorded second trust subsequent of

record only to the first trust building loan of \$4,000 for each house.

Therefore, the appellee can rely upon the defense pointed out by this Court in resisting the contention of appellants. Appellee has not only not received the security agreed upon with Hight (houses costing \$5,000 each), but it has not even received security to the extent of houses costing \$4,000 each, the amount of the building loan. If appellants did not know that Hight had agreed with appellee to build houses costing \$5,000 each, appellants nevertheless knew (as shown by the admissions in the 9th, 12th, 16th, 18th, and 32d paragraphs of their answer (R. 16-19), as well as from other admissions and circumstances as pointed out on pp. 29-34 hereof), at the time of supplying materials for the houses, that the houses should have cost at least \$4,000 each, and that appellee's security for its recorded second trust was to be houses costing \$4,000 each. Appellants admit that the houses cost less than \$3,322.04, or less than \$3,502.50 each, for the ten houses for which they supplied materials. Appellants have admitted that at the time appellee filed its Bill, Hight had already received more than sufficient to pay for the cost of construction of the houses, and that the fund in question is in addition thereto and considerably in excess of the amount of cost of the houses.

It is submitted that appellee has an equity in that fund superior to that of appellants, on the authority of the Assn. case; the decision in that case being in part as follows (p. 600) :

“The special circumstances relied on to create the trust (in favor of the materialmen) are summed up as follows for consideration :

It appears, with sufficient certainty, that the

houses have been completed in compliance with the plans and specifications submitted with the application for the loan, AND THAT THEY COST THE SUM OF \$46,500 (*the full amount of the building loan*).

If the association had any defense upon either of those grounds the facts were within its knowledge, and it was its duty to prove them."

In the case at bar appellee's defense is conclusively established by appellants' admissions as set forth above.

4.

IN THE ASSN. CASE THE MATERIALMEN MEN HAD FILED MECHANICS' LIENS, BUT IN THE CASE AT BAR THE MATERIALMEN (APPELLANTS) HAD NEVER FILED SUCH LIENS.

In the Assn. case the materialmen, who were the prevailing parties, had exercised all due diligence, and had promptly filed Notices of Liens under the Mechanics' Lien Law. In the case at bar the materialmen, who seek an equity in the fund superior to that of appellee, have never filed any Notices of Liens, and had permitted Hight on April 28, 1916, to receive out of the building loan more than sufficient to pay not only their bills in full, but all other bills necessary to complete the houses, without taking any steps whatsoever to protect themselves by filing Liens, suits at law, or any other proceedings, and had waited from April 28, 1916, when the fund in question (which fund, according to appellants' admissions, was considerably in excess of the actual amount of the cost of building the houses),

was conserved by the Court below at the instance of appellee, until AFTER the houses were sold on June 19, 1916, under foreclosure sale under the first trust, to intervene in this case and ask a court of equity to reward their prior inaction and disregard of ordinary business precautions by turning over to them in preference to appellee the very fund which would not have been in existence at the time they stepped into the case except for the diligence and precaution of appellee. It does not avail appellants to say that if the appellee had not tied up the fund by the injunctive relief granted by the Court on April 28, 1916, Hight would have used this fund to pay appellants, because appellants have already admitted that Hight had already received more than sufficient out of the building loan to pay not only appellants' bills, but all other bills incurred in the completion of the houses, and hence it is not to be presumed that Hight would have paid them out of this fund any more than he would have paid them out of the sufficient amount he had already received,—the presumption is rather to the contrary, that, but for the action of appellee this fund would have also gone to swell the amount Hight already received out of the building loan without paying these appellants.

In the Assn. case, unless Lea received the amount which was retained out of the building loan, he would not have received an amount sufficient to pay all the bills for constructing the houses. In the case at bar, Hight has received not only sufficient, but more than sufficient, out of the building loan to pay all the bills for constructing the houses, and the appellants instead of looking to Hight, or to the amount out of the building loan he had already received sufficient to pay their bills in full as well as all other bills on the houses, or to the houses themselves which appellants knew were costing

far less than the amount of the building loan, are now asking in a court of equity that Hight be permitted to retain all he has received without therefrom paying appellants, and that appellants, forsooth, be paid out of this fund, notwithstanding their knowledge that there was a second deed of trust on the property subsequent only to a first trust building loan of \$4,000 for each house—that this second trust was a “purchase money” trust and the security therefor, in addition to the land, was to be houses costing at least \$4,000 each.

It is respectfully submitted that a Court of equity should not uphold such a claim as the appellants present.

5, 6, AND 7.

THE CONTRACTS OF THE MATERIALMEN IN THE CASE AT BAR ARE NOT SIMILAR TO THE CONTRACTS OF MATERIALMEN IN THE ASSN. CASE: (6) AND THE AGREEMENTS TO SUBORDINATE THE PURCHASE MONEY TRUST TO THE BUILDING LOAN TRUST ARE NOT SIMILAR; (7) AND THE LOAN CONTRACTS IN THE TWO CASES ARE NOT SIMILAR.

In the Assn. case, the contracts of the materialmen for supplying material were made directly with Lea, the original vendee of the real estate involved, said vendee being the party who executed the first trust building loan, and the second trust to secure the purchase money to his vendors. These contracts provided for payments to be made to the materialmen by said Lea, from time to time, in agreed upon installments, as the work on the houses progressed, and these times of payments corre-

sponded to the dates of payments to Lea out of the proceeds of the building loan.

In the case at bar, the contracts of the materialmen were made with "C. B. Hight Company, a corporation," *which is not a party to this equity cause*, and the interest, if any, of said alleged corporation in the houses, or their construction, does not anywhere appear in appellants' answer (R. 17, 18). Moreover, these contracts, according to the averments of said answer, did not provide for payments to the materialmen, from time to time, in agreed upon installments as the work on the houses progressed, but simply provide for the payment of the total amount called for under the contracts; and the answer then avers some of the appellants have been paid in part, and that other appellants have been paid nothing on their contracts, although the material has been furnished, and labor performed, thereunder.

Another difference between the two cases is, that in the Assn. case (p. 585): "there was some arrangement, the particulars of which do not appear, by which Lea's grantors agreed to " subordinate that purchase money trust to that of the building loan, but in the instant case the particulars of such agreement fully appear, not only by the recitals in the Bill, but also in the four exhibits attached to and filed with the Bill, and to some extent by the recorded first trust. Further, as we have shown hereinbefore, the materialmen were not concerned about the particulars of such agreement in the Assn. case, because in that case, the second trust was paid, and therefore did not take priority over their claims for unpaid material and labor. In the instant case, however, the very origin of this equity cause was the filing of appellee's bill to enforce its rights under such an agreement which had resulted in its recorded second deed of trust,

of which appellants had knowledge, and which was unpaid.

Another difference between the two cases is, that in the Assn. case the particulars of the loan contract, especially the schedule of advances or payments thereunder, and times thereof, from the lender to the borrower are clearly set forth. In the case at bar the only information to be gained as to the particulars of the loan contract is found in the allegations of the Bill and Answer, and there are no allegations that said building loan was to be advanced in stated and agreed upon amounts, at agreed upon times as the work on the houses progressed; and the facts that the materialmen were not paid by Hight at stated times, which times corresponded to the stated times at which he received advances from the building loan (as was the fact in the Assn. case), is shown by the circumstance of Hight having received sufficient out of the building loan without in some instances, paying anything to his materialmen, and in other cases only part. This brings us to another very essential difference between the two cases, namely:

8.

IN THE ASSN. CASE, THE PARTY, WHOSE EQUITY IN THE FUND WAS SUBORDINATED TO THAT OF THE MATERIALMEN, HAD, ITSELF MADE PAYMENTS DIRECTLY TO THE MATERIALMEN OUT OF THE PROCEEDS OF THE BUILDING LOAN, BUT IN THE CASE AT BAR APPELLEE NEVER HANDLED OR CONTROLLED ANY PART OF THE BUILDING LOAN.

In the Assn. case:

(p. 600) "The written contract with Campbell shows the times of his payments corresponding with those of the advances to be made to Lea. They knew the details of the loan contract."

(p. 601) "It appears, as if in express recognition of the reasonable expectations of Lea's contractors, that the practice in making payments was this: When the time for a payment arrived, a draft payable to Lea's order was sent by the association to ITS attorneys in Washington. Lea at once endorsed it to them and they collected the draft AND DISBURSED THE MONEY. Claimants of money on account of the buildings often notified them of the same, and they, in turn, notifying Lea's sureties, WERE SOMETIMES DIRECTED TO PAY THEM, AND DID SO. ALL THAT THEN REMAINED WAS DELIVERED TO THE SURETIES ON THE BOND GIVEN BY LEA." * * *

(p. 603) "Having by its conduct, induced or contributed to induce the (materialmen) to contract with Lea, and with their materials to increase the security for its own debt, it would be inequitable and unjust to permit the association to withhold the money upon which they relied for reimbursement"

In the Case at Bar:

No written contract appears here, and the allegations of the pleadings, as we have said before, contain no reference to times when Hight was to pay his materialmen, nor reference to times of advances to Hight from the building loan.

In the case at bar, appellants do not attempt to claim that the appellee ever handled or disbursed, or attempted to control or direct the disbursement of any part of the building loan, or that the Maryland Title Co., or Karr, or the Casualty Co., ever did so. And, even if any of those other defendants had done so, their acts in so doing could not be imputed as an act of appellee to the extent of establishing equitable estoppel against appellee in respect to claiming a trust in the fund.

15

In the Assn. case, it will thus be seen that this Court impressed a trust upon the fund there involved (balance of loan retained by lender) in favor of the materialmen as against the lender, because the lender's attorney had made prior payment to those materialmen out of the former advances on the loan, and hence the lender was equitably estopped from claiming the retained balance of the loan, since the lender's conduct had led the materialmen to rely on being paid in full out of the full amount of the last advance to be made under the loan. The very foundation of the Court ruling in the Assn. case, it is respectfully submitted, was the application of equitable estoppel to the conduct of the lender, thereby establishing a priority in the fund in favor of the materialmen. But, in the case at bar, how can it be said that the appellee is charged with the same conduct as was the basis of the Court's ruling in the Assn. case? The appellee never had any dealings whatsoever with the materialmen, directly or indirectly, in regard to their bills, their contracts, payments to them, promises, representations, or conduct constituting representation, or in any manner whatsoever.

It is respectfully submitted that, under the facts in the case at bar, appellee cannot be held equitably estopped from claiming priority of trust or equity in the fund involved herein as against the appellants, and that its equity or trust is paramount to that of appellants.

9.

THE FUND INVOLVED IN THE CASE AT BAR IS NOT SIMILAR TO THE FUND INVOLVED IN THE ANGLO-AMER. ASSN. CASE.

As stated before, in the Assn. case the fund was an

amount retained by the beneficiary out of the total amount it had agreed to loan, and for which amount it held the recorded first deed of trust. Here the fund was not retained by the beneficiary under the first trust, the Maryland Title Co., but *the* fund involved herein had been parted with by the Title Company and at the time of the entry of the restraining order on April 28, 1916, was in the hands of another party, the Casualty Company, surety for Hight,—in effect in Hight's hands. It follows that the appellants, under the uniform line of authorities, and the decision of this Court in the Assn. case, can claim no equity or trust in the fund. We do not understand that appellants deny the correctness of this ruling as laid down in the other authorities, and as expressed in the Assn. case as follows:

(p. 601): "It contracted to advance Lea the full sum of \$46,500. It is true, as we have said before, that this contract with Lea did not bind the association to see that he actually applied the money, WHEN ADVANCED, to the payment of his contractors. Payment into his hands was all that it was bound to make, and Lea's creditors had, therefore, no legal right to ask anything more. *Had he received all of the money, and then failed to pay them, they would have no remedy against the association, for its obligation would have been completely discharged.*"

(p. 603): * * * "The association was under no legal obligation to see that Lea paid the money *when advanced* to the appellees (the materialmen)."

It may be, however, that appellants will contend, although their brief makes no such contention, that the

possession by the Casualty Company of the fund in question is possession by, or retention by, the Maryland Title Company. But the possession by the Casualty Company is not the retention of the fund by the Title Company, because it is the admitted fact (parg. 18, R. 10; parg. 18, R. 17) that the Casualty Company was surety for and held the fund for Hight, not for the Title Company,—the Title Company had parted with the money to the Casualty Company for Hight.

If the Casualty Company had misappropriated the money, Hight could not have compelled the Title Company to advance the money again, because the Casualty Company was surety for Hight and not for the lender, the Title Company;—the lender had in effect advanced the loan to the borrower.

Further, on behalf of appellee it is respectfully submitted that this Court can not lose sight of the fact that this *same* equity cause has been before this Court on the special appeal allowed Hight, and subsequently dismissed (Case No. 3028, 45 App. D. C., 583), and that at that time this Court had before it the following record in regard to this fund (pp. 55, 58, of the *printed* copy of the appellee's sworn Motion and Brief to Dismiss the Special Appeal in said Case No. 3028) :

“Mr. Hight: The account was opened, and had to be paid out on the joint check of the New Amsterdam Casualty Company and C. B. Hight.

* * * * *

“The Court: The fund was in the joint control of the New Amsterdam Company and Mr. Hight, and he has now relinquished it to the sole control of the New Amsterdam Company;”

In other words, that, at the time of the entry of the

restraining order on April 28, 1916, the fund was in bank to the joint credit of the Casualty Company and Hight, and *subsequently* transferred to the sole credit of the Casualty Company.

Therefore, since the fund in the case at bar is not at all of the same character or surrounded with the same special circumstances as the fund in the Assn. case—(the fund here having been parted with by the lender to the borrower, and the fund there having been retained by the lender out of the amount he had agreed to loan)—the Assn. case does not support appellants' contention on this appeal; and *appellee's trust in the fund is paramount to that of appellants.*

It is respectfully submitted that by the analyses of the Assn. case and of the case at bar, the two cases have been reduced to their above-mentioned essential differences, and that these differences clearly establish that in the case at bar the materialmen can not rely on any facts or circumstances constituting the "special circumstances" or "equitable considerations" relied on in the Assn. case to create a priority of trust in favor of the materialmen in that case.

Authorities cited in the Assn. case.

While the opinion in the Assn. case takes care to announce (p. 604), that the ruling therein laid down was not based on any "decision directly in point," it does refer to some State cases, not as precedents for its ruling, but as eliminating some of the contentions advanced by the materialmen. As there are certain facts and circumstances present in the case at bar, which were not present in the Assn. case, and some of the facts of the Assn. case do not appear in the case at bar, it is

thought a brief summary of some of those citations will expose the fallacy of the claims of the materialmen in the case at bar. It must be borne in mind that in all those cases the materialmen had filed Liens, and were *statutory* lienors, but the line of reasoning in some of the cases aptly fits the case at bar.

In the case of *Hoagland v. Lowe*, 39 Neb. 397, the vendor of the land subordinated her purchase money trust to that of a building loan mortgage, so that her vendee could secure building funds. The purchase money mortgage, or second mortgage, contained the following covenant:

"I further covenant, in consideration of this mortgage being made subject to said mortgages (building loan mortgage) above described, that I will use the whole of the proceeds of said mortgage in the making of improvements on said premises" (p. 400).

In a proceeding to foreclose this mortgage, the holder of the first mortgage and certain materialmen who had filed statutory Liens against the property intervened, and the latter contended (p. 403), "that, inasmuch as the plaintiff waived her right of priority and allowed her purchase money mortgage to be postponed to (building money mortgage), under the statement in her mortgage that it was done in order that the money might be obtained * * * for the purpose of improving the property and building houses, the mortgagor agreeing to use such money for that specific purpose and none other * * * the liens of the mechanics and materialmen should be given priority to her mortgage." The Court, after observing that both mortgages were recorded before the materialmen supplied any material, said

(p. 407) that *the materialmen "have no show in equity to demand that their liens shall be preferred."*

The cases of *Bohn Mfg. Co. v. Kountz*, 30 Neb. 719, and *Henderson v. Connelly*, 123 Ill. 98, cannot apply to the case at bar, as in both those cases the owner of the realty *retained* his *record* title during the building operation, under an unrecorded agreement to convey the title to the builder when the houses were completed, and *then* to take back a purchase money mortgage.

In the case of *Patrick Land Co. v. Leavenworth*, 42 Neb. 715, it was stated that:

"In this case there can be no doubt that the land company and the investment company both had contracts with McIntire (the mortgagor), requiring that houses should be built, and it was understood that the loan of the investment company was negotiated for the purpose of building, but there was no contract between any of the parties requiring the money to be so used. * * * The mere knowledge of the parties that the owner had in view the obtaining of funds to build when he negotiated the loan did not impress upon them the duty to see that the loan was applied to that purpose; nor did either mortgagee ever undertake any such duty. There was no appropriation of the fund for that purpose by the contract."

The Land Company had subordinated its purchase money trust to that of the investment company which loaned the building money, and the materialmen sought superiority of their liens over the mortgages, but such priority was refused the materialmen. That the mere subordination of the purchase money mortgage to that of the building loan, and the knowledge of the parties

that the loan was for the purpose of building, could not constitute estoppel operating on the holder of the purchase money mortgage in favor of the materialmen, is clearly shown, because the Court had just stated those were the facts in the case, and then refused to allow the materialmen priority, and then added: "If the mechanics obtained any such right to have the funds distributed for that purpose (to satisfy their liens before the mortgages), it must have been by facts constituting estoppel.

In the case of *Rogers v. Central L. & T. Co.*, 49 Neb. 676, the Court intimated that in a proper case materialmen might proceed in equity for the enforcement of their unpaid bills, apart from the mechanics' lien Act, and that observation was based upon the facts which appeared in that case, namely, that the Central Company, which loaned the building money, had itself diverted \$8,415 out of the proceeds of the loan to pay off a prior mortgage on the property on which it held a building loan mortgage. However, there was no case of a purchase money mortgage involved in that case; and the appellee in the case at bar cannot be charged with similar conduct as committed by the mortgagee in that case.

In the case of *Moroney's Appeal*, 24 Pa. St. 373, C. sold certain lots to M. "At the same time C. contracted, in writing, to lend M. \$12,000 to aid M. in erecting buildings upon the lots." The loan was to be advanced in proportion as the houses progressed, "the final payment to be made when the houses 'shall be finished,' and releases of liens fully signed." The buildings were completed and the money advanced to M. "Some of the builders, not having been fully paid, entered liens." The houses were sold "and the money brought into court for distribution. The mechanic lien creditors claimed

priority to the mortgage of C., and were not allowed it, and hence this appeal."

On appeal the decree was affirmed, the Court saying, in part:

"If the owners of these liens trusted M. without examining the state of the records, the law provides no relief from the consequences of their neglect, and morality does not demand that it shall, and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of C. standing against M., and honestly forbids them to cut it out for their own profit. For, if they found it, and still trusted him without inquiring, then they agreed to trust him even with a lien against him of \$12,000, and with no apparent means to pay it. *If they made inquiries, then they learned that he would have \$12,000 in hands to pay for the improvements he was making, and they trusted him that he would appropriate it properly. In no way that we regard this case, can we perceive that the appellants have any show of equity to demand that their claims shall be preferred to the mortgage.*"

Nowhere in the Assn. case can there be found any ruling, *dictum*, or inference that the mere conduct of the vendors of the land (in having subordinated their "purchase money" trust to a first trust which they knew was a building loan), could possibly operate as an equitable estoppel against them, on the ground that they thereby induced the materialmen to supply material for

the houses; nor did such question arise, because in that case the purchase money trust had been satisfied, and especially because in that case the houses (the security for the trust) cost the full amount of the building loan.

In the case at bar the houses did not cost the sum of the building loan, and no part of the second trust has been satisfied, and there is an agreement that the houses should cost \$1,000 each in addition to the sum of the building loan.

It is respectfully submitted that none of the "special circumstances" or "equitable considerations," which were the basis of this Court's decision in the Assn. case, can be relied upon by the materialmen in the case at bar to sustain their contention that they have a lien, or priority of equity, on the fund in question superior to appellee's trust or equity in said fund.

FOURTH

APPELLANTS' CLAIMS ARE NOT COGNIZABLE IN EQUITY.

Appellants' brief seems to proceed on the theory that the only question to be decided by this Court on this appeal is one of priorities in the fund, but appellee respectfully submits that before that question can be passed upon at all, it must first be held that appellants' claims are cognizable in a court of equity,—that they present such "equitable considerations" apart from the limitations of the Mechanics' Lien Act that a court of equity has jurisdiction to entertain them.

Appellee promptly demurred to appellants' answer below and renews its demurrer in this Court,—that appellants' answer does not state or allege any matters or facts entitling appellants to equitable remedy or relief, and, at all events, does not entitle them to any equitable

remedy or relief in this cause,—that their claims are not cognizable in equity. Attention is respectfully directed to the grounds of appellee's motion to strike out appellants' answer (R. 20-21), and it is respectfully submitted that the Decree below should be affirmed on the ground that a court of equity has not jurisdiction to entertain the case made out in appellants' answer.

Appellants' assumption that they have equitable claims to the fund loses sight of the elementary fact that, as materialmen supplying Hight with material, they stand in no better, but in the same, status as all other general unsecured creditors of Hight, and that they have no right whatsoever to appear in a Court of Equity, *unless and until* they bring themselves within the statutory provisions of the Mechanics' Lien Act, or can rely on the "special circumstances" or "equitable considerations" of the Assn. case. In the case at bar, they neglected to take any steps under the Mechanics' Lien Act to protect themselves, and hence they can not rely upon any statutory right to present their claim in an equity court, and it has already been shown under appellee's Third Reply, pp. 18-54 hereof, that appellants can not rely in the case at bar on the benefit of the decision in the Assn. case as giving an equity court jurisdiction to entertain their claims, because the "special circumstances" or "equitable considerations" do not exist here in favor of the materialmen in this case.

The "special circumstances relied on to create the trust" in favor of the materialmen in the Assn. case were:

That the completed houses cost the full sum of the building loan:

And that the Association was equitably estopped from claiming the fund, owing to its previous course of conduct and circumstances which led the materialmen to expect they would be compensated out of the fund which the Association subsequently attempted to retain and keep for itself.

In the case at bar, appellants have admitted that the houses did not cost the full sum of the building loan, and appellants in the case at bar can not point to (in the words of the Assn. case, p. 603) any "promise for the benefit of" appellants made by appellee, "nor express fiduciary relations between them," nor to any "representation, conduct, and the like, that have been relied upon by (appellants) under such circumstances as create an equitable estoppel upon" appellee to thereafter claim priority of trust in the fund, nor to any "arrangement with" Hight "for the detention of a portion of the money," nor to any contract calling for appellee to advance any money "to enable him (Hight) to pay for the construction of the houses." Nor had appellee "by its conduct, induced or contributed to induce the (appellants) to contract with (Hight), and with their materials to increase the security for its own debt;" nor has appellee withheld any "money upon which they relied for reimbursement." Nor is appellee's claim for a constructive trust, or priority of equity or trust, in the fund "the unconscientious and inequitable assertion or enforcement of claims or rights."

The argument on the last page of appellants' brief, that, as materialmen who furnished material which went into the houses on which appellee holds a deed of trust, they have a priority of equity in the fund as against appellee, has been previously disposed of by this Court in the case of *Richardson v. Belt*, 13 App. D. C. 197, 201, in the following language:

"The contention on behalf of the appellants is, that independent of the statute (Mech. Lien Law), the defendants have an equitable lien upon the fund, * * * because the said fund was created by the materials furnished by them to Jones for the performance of his contract. How, without special contract, such a lien could exist despite the limitations of the mechanics' lien act itself, is difficult to comprehend. Nor are we particularly impressed with a process of reasoning that, in the absence of any statutory provision, would raise up in favor of a creditor, who, without contracting for a lien, shall have furnished materials used in a building, an equity that does not exist on behalf of other creditors generally, whose goods—sold on credit and remaining unpaid for—may have been converted into money by their debtors, or may even remain unconverted at the time of the debtors' insolvency or decease."

The same question was disposed of in the case of U. S. Fid. & G. Co. v. U. S. & Mex. Trust Co., 234 Fed. 238, where the analogous contention was made on behalf of the sureties on a supersedeas bond given at the request of a mortgagor to stay the collection of judgments, the Court saying:

"And even if it were true that the surety, by its bond to pay the judgment, preserved security or property which subsequently came to the bondholders, and which they otherwise would have lost, *that fact would not give the surety a preferential equity over the bondholders. If it would, then every unsecured creditor, whose moneys, labor, material, or guaranty aided to preserve or*

enhance the value of the mortgaged property, might, by delaying collection of the mortgagor's debts, secure an equitable lien superior to that of the mortgage.

* * * * *

"If the argument of counsel for the Fidelity Company could be sustained, its practical effect would be to strike down the security of every railroad mortgage, and give to unsecured creditors liens superior to those of the creditors who by mortgage bonds, *in reliance upon secured mortgages*, secure their payment. THE LAW AND EQUITY, THE WRITTEN CONTRACT, EVIDENCED BY THE MORTGAGE AND ITS RECORD, AND THE RELATIVE EQUITIES OF THE PARTIES, CRY OUT ALIKE AGAINST THE PAYMENT * * * OF THE CLAIM * * * IN PREFERENCE TO THE CLAIMS OF THE BONDHOLDERS SECURED BY A PRIOR MORTGAGE."

As stated, appellants are simply unsecured general creditors of Hight, and the appellee is a secured creditor—it holds a recorded "purchase money" deed of trust. And, that the particular fund involved herein is security for appellee—that the fund is impressed with a constructive trust in appellee's favor (the first trust having been satisfied, R. 21) is conclusively established, we submit, in appellee's brief filed in the main appeal pending in this equity cause, *Hight v. Appellee*, case No. 3085.

In connection with appellee's "purchase money" deed of trust, it should be noted that at the time (1898) of the decision in the *Assn.* case, the Mechanics' Lien Act then in force was chapter 45 of Com. Stats., D. C., (23

Stats. L. 64), and that, when the D. C. Code was subsequently adopted, sections 3 and 4 of the former statute were merged into one section of the Code, sec. 1245, being tied together by the following *new* provision, which was not in force at the time of the decision in the Assn. case, namely:

“nothing herein shall affect the priority of a mortgage or deed of trust given to secure the purchase money of the land, if the same be recorded within ten days of the acknowledgment thereof.”

It is respectfully submitted that, if this Court should sustain appellants' contention, this Court would thereby say to every owner of real estate in the District of Columbia:

If you sell your real estate and take back a deed of trust to secure yourself the purchase money which you permit to be *recorded subsequent only* to a *recorded* first deed of trust placed on said realty by your grantee “for the specific and sole purpose of paying for the building of houses to be erected by him” (R. 18) on said realty, and you know that the person loaning the money “knew that said loan was being negotiated for this purpose, and the proceeds were to be applied to the payment for material and labor used in said buildings” (R. 18), and the materialmen know of the loan contract between the lender and your grantee before supplying their material, and were promised by your grantee that the loan was to be used for said purpose, “and they relied upon this representation and promise as the basis of the credit” (R. 18) they extended (not to you, but) to your grantee, “and not upon the individual responsibility” of your grantee, *and you record your deed of*

trust before the materialmen supply any material for the houses. (R. 6, 17.)

THEN, in case the houses are fully completed (R. 19) and cost considerably less than the sum of the building loan (R. 10, 17), and the materialmen are not paid in full by your grantee, although he may have received from the proceeds of said loan an amount or fund "considerably in excess of the amount actually required to complete said houses" (R. 10, 17), and this fund over the actual cost of the completed houses is in the hands of your grantee (or, perhaps, still in the hands of the lender), and you file your bill in equity to subject this fund to a constructive trust in your favor and show that your grantee had agreed to build houses costing not only the amount of the loan, but \$1,000 each in addition thereto as security for your purchase money second trust, and that you had relied upon his fraudulent representations in that respect in conveying your realty to him,

THEN, IN SUCH A CASE YOU ARE PRESUMED TO KNOW that the Equity Court of this District will disregard the provisions of section 1245 of the Code, and "despite the limitations of the Mechanics' Lien Act itself" (13 App. D. C., 201), will not only entertain jurisdiction of the claim of the materialmen, but will award them priority of equity or trust in that fund, notwithstanding the admission of the materialmen (R. 3-4, 16) that you hold an agreement calling for your security (the realty) to be improved with not only all the proceeds of the building loan but \$1,000 extra for each house, and the materialmen have never complied with any of the provisions of the Mechanics' Lien Act.

Such is the astounding, inequitable and stale claim of appellants' answer, when stripped of non-essentials and exposed in its nakedness to the inspection of this

Court to be viewed in the light of the circumstances,
that appellants,

with knowledge of the recordation of the trust
securing appellee (and that the first trust was
a building loan), contracted to, and supplied,
the materials for the houses;
and, without at any time attempting to file
Notices of Liens, or in any wise attempting to
bring themselves within the benefit of the Me-
chanics' Lien Law, or suing him at law,

had permitted Hight on April 28, 1916,

to have *already* received out of the proceeds of the
first trust loan *more than the full cost*, not
only of the ten houses in which appellants were
interested,
but also *more than the full cost* of the other two
houses,
and, in addition, had permitted him to receive
out of the same loan and to have to his joint
credit in bank with the Casualty Company a
still *further* amount, *the fund in question*
(\$9,135.52) over and above what he had already
thus received,

and that the appellants waited from said April 28, 1916

(when said fund, through the restraining order
granted by the lower Court at the instance of
appellee, was prevented from also being turned
over to Hight's sole control),
until after the property had been sold at foreclos-
ure sale on June 19, 1916, under the first deed

of trust and had resulted in a deficiency thereunder,

to walk into the case for the first time on June 26, 1916, and say to the Court, in effect, by their answer:

"All those circumstances (stated above and others) are of no moment—we are materialmen—give us this fund—give us the fruits of the appellee's diligence."

It is respectfully submitted that a court of equity should not entertain such a claim, and that the appellants' answer was insufficient as matter of law in that it did not present a case for equitable relief, or at all events, for equitable relief in the case at bar.

CONCLUSION.

It is respectfully submitted, in conclusion, that the action of the Court below was correct, and should be sustained by this Court.

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